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LABOR LAW

EMPLOYMENT DISCRIMINATION

LABOR LAW

I. ORGANIZATIONAL AND REPRESENTATIONAL ACTIVITY

A. **Status of Nurses as "Supervisors" Under the National Labor Relations Act:* NLRB v. Health Care & Retirement Corporation of America[1]

The National Labor Relations Act (the "Act") protects against employers' unfair labor practices by enabling employees to form and join labor organizations and engage in collective bargaining and other concerted activities.[2] Congress amended the Act in 1947 to exclude supervisors from the definition of "employee," thus removing supervisors from its coverage.[3] Section 2(11) of the Act defines a "supervisor" as an employee who has the authority to do any of twelve listed activities "in the interest" of his or her employer.[4] Congress created this exclusion to maintain a balance of power between unions and employers, and to prevent certain inevitable conflict of interest situations from arising.[5]

In contrast, section 2(12) of the Act specifically includes "professionals" within the definition of "employee" contained in section 2(3)

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[1] 114 S. Ct. 1778 (1994).

[2] National Labor Relations Act, 29 U.S.C. §§ 157, 158 (1988).

[3] *Id.* § 152(3).

[4] Specifically, the Act defines supervisor as:

> [A]ny individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Id. § 152(11).

[5] *See* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465–66, 113 L.R.R.M. 2336, 2337–38 (1983). Congress feared that aligning supervisors with the labor unions would result in an imbalance of power between the unions and employers because employers could not be assured of the loyalty of their own representatives. *See id.* Such an alliance could result in employers losing their work forces to the unions, especially in strike situations, where often it is the supervisors who work to ensure that the company does not shut down completely. *See id.* Congress further recognized that allowing supervisors to join the same labor unions and enjoy the same protection of labor activities as regular employees could create an additional conflict of interest for supervisors between the interests of the unions and the interests of their employer. *See id.* For example, supervisor union members could face conflicts in hiring and firing situations between the interest of the employer in maintaining the highest quality work force and the interest of the union in having its members employed. *See id.*

of the Act.[6] Both the courts and the National Labor Relations Board (the "Board") have noted the difficulty in determining whether employees such as nurses and lawyers, who, in accordance with the norms of their profession, perform activities that could be characterized as both professional and supervisory, fit within the "professional" inclusion of the Act, or the "supervisor" exclusion from the Act.[7]

In 1980, in *NLRB v. Yeshiva University*, the United States Supreme Court concluded that the professional interests of faculty members could not be separated from the interests of the employer University, and that faculty members were thus managerial employees excluded from coverage under the Act.[8] The University refused to bargain with the Yeshiva University Faculty Association, which acted as a certified bargaining agent for the faculty members of Yeshiva University.[9] The University contended that the faculty members were supervisory or managerial personnel, and thus not covered by the Act.[10] Among other managerial powers, the faculty members at the University had the authority to determine curriculum, grading, admission, matriculation standards, academic calendars and course schedules, and to make recommendations as to hiring, discharge and tenure of professors.[11] In unfair labor practice proceedings brought by the Yeshiva University Faculty Association, the Board characterized the faculty members as professional employees covered by the Act and ordered the University to bargain.[12] In analyzing the status of the faculty members, the Board distinguished between the individual interests of the faculty members as professional employees and the interests of the University in accomplishing educational goals.[13] The Board sought enforcement in the United States Court of Appeals for the Second Circuit, which denied

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[6] 29 U.S.C. § 152(12). In relevant part, section 2(12) of the Act defines "professional" as:

> (a) any employee engaged in work (i) predominantly intellectual and varied in character . . . (ii) involving the consistent exercise of discretion and judgment in its performance . . . (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital. . . .

Id.

[7] *See* Children's Habilitation Center v. NLRB, 887 F.2d 130, 131, 132 L.R.R.M. 2780, 2781 (7th Cir. 1989).

[8] 444 U.S. 672, 688, 103 L.R.R.M. 2527, 2533 (1980). Managerial employees, like supervisors, are excluded from protection of the Act. *See* NLRB v. Bell Aerospace Co., 416 U.S. 267, 275, 85 L.R.R.M. 2945, 2948 (1974). Unlike the statutory supervisor exclusion, the managerial exception is judicially implied. *See id.*

[9] *Yeshiva*, 444 U.S. at 674–75, 103 L.R.R.M. at 2528.

[10] *Id.* at 675, 103 L.R.R.M. at 2528.

[11] *Id.* at 676–77, 103 L.R.R.M. at 2528.

[12] *Id.* at 678, 103 L.R.R.M. at 2529.

[13] *Id.*

the petition, stating that the extensive control possessed by the faculty over academic and personnel decisions conferred managerial status upon them.[14]

The Supreme Court, in affirming the decision of the Second Circuit, disagreed with the Board's interpretation of the statutory phrase "in the interest of the employer" in determining the supervisory or managerial status of faculty members.[15] The Supreme Court expressly rejected the Board's distinction between the professional interests of the faculty and the educational interests of the University, stating that the two interests are inseparable because faculty members fulfill their own interests in improving their academic standing by ensuring that the academic goals of the University are met.[16] Thus, the Court concluded that the faculty members were managerial employees within the meaning of the Act.[17]

In 1983, in *NLRB v. Beacon Light Christian Home*, the United States Court of Appeals for the Sixth Circuit held that twenty licensed practical nurses ("LPNs") at a nursing home were supervisors within the meaning of the Act.[18] The United Furniture Workers of America (the "Union") petitioned the Board in July, 1984, for certification of its representation of workers at the nursing home, including the LPNs and the nurse's aides.[19] The employer contested the Union's definition of the bargaining unit in a hearing before an administrative law judge ("ALJ"), who determined that the unit properly included the LPNs.[20] The Regional Director subsequently issued a complaint against the employer for refusal to bargain, and the Board entered an order against the employer.[21]

The Sixth Circuit refused to enforce the Board's order, finding that the LPNs were supervisors because they had the same authority to supervise, instruct, evaluate and discipline aides as did the registered nurses employed by the nursing home.[22] The court reasoned that even though the LPNs did not have the absolute authority to discharge or

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[14] *Yeshiva*, 444 U.S. at 679, 103 L.R.R.M. at 2529.

[15] *Id.* at 688, 103 L.R.R.M. at 2533.

[16] *Id.*

[17] *Id.* at 679, 103 L.R.R.M. at 2529.

[18] 825 F.2d 1076, 1077, 125 L.R.R.M. 3414, 3415 (6th Cir. 1987). The Sixth Circuit has consistently ruled that nurses with some supervisory duties fall within the supervisor exclusion of the Act. *See, e.g.*, Health Care & Retirement Corp. of Am. v. NLRB, 987 F.2d 1256, 1261, 142 L.R.R.M. 2728, 2731 (6th Cir. 1993), *aff'd*, 114 S. Ct. 1778 (1994); Beverly California Corp. v. NLRB, 970 F.2d 1548, 1556, 140 L.R.R.M. 2961, 2967 (6th Cir. 1992).

[19] *Beacon Light*, 825 F.2d at 1078, 125 L.R.R.M. at 3415.

[20] *Id.*

[21] *Id.*

[22] *See id.* at 1077–78, 125 L.R.R.M. at 3415.

promote nurse's aides, they possessed enough responsibility for evaluation and discipline of the aides to require a finding of supervisory status.[23] The court additionally analyzed the ratio of supervisory personnel to nurse's aides on each shift, and determined that if the LPNs were not characterized as supervisors, then the nursing home's schedule would regularly permit nursing personnel to provide patient care without supervision, an unreasonable conclusion for what the court found to be a well-run nursing home.[24] Consequently, the court declined to include the LPNs in the bargaining unit due to their status as supervisors under the Act.[25]

In contrast, in 1989, in *Children's Habilitation Center, Inc. v. NLRB*, the United States Court of Appeals for the Seventh Circuit held that charge nurses at a residential facility for ill and disabled youths were not supervisors despite exercising some supervisory authority over other employees.[26] Following a Board election on September 29, 1987, the Board certified the General Service Employees Union, Local 73, AFL-CIO (the "Union") as the exclusive collective-bargaining representative of the employees of Children's Habilitation Center (the "Center").[27] Subsequently, the Center refused to bargain with the Union, and the Union filed a complaint with the National Labor Relations Board.[28] The Board found that the Center's refusal to bargain constituted unfair labor practices, and ordered the Center to bargain with the Union.[29]

In affirming the decision of the Board that the nurses were not supervisors, the court similarly reasoned that the definition of "supervisor" as contained in the Act allows an employee to do some supervision without becoming a supervisor, such as supervision exercised by an employee as a professional acting in accordance with professional norms.[30] The court cited the purposes of the supervisor exclusion in determining that the charge nurses' direction of aides did not constitute supervision within the meaning of the Act.[31] The court concluded

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[23] *See id.* at 1079, 125 L.R.R.M. at 3416–17.

[24] *Beacon Light*, 825 F.2d at 1078, 1080, 125 L.R.R.M. at 3415, 3417.

[25] *Id.* at 1080, 125 L.R.R.M. at 3417.

[26] 887 F.2d 130, 134, 132 L.R.R.M. 2780, 2783 (7th Cir. 1989). Such nurses are designated charge nurses because they are "in charge" of their respective nursing station during their shift. *See* Wright Memorial Hosp. v. NLRB, 771 F.2d 400, 402 (8th Cir. 1985).

[27] *Children's Habilitation Center*, No. 13-CA-27423, 1988 NLRB LEXIS 311, at *1 (NLRB July 28, 1988).

[28] *Id.*

[29] *Id.* at *6.

[30] *Children's Habilitation Center*, 887 F.2d at 131, 132 L.R.R.M. at 2781.

[31] *Id.* at 134, 132 L.R.R.M. at 2783.

that because professional standards required such supervision, and not the standards of the employer, the supervisory activities raised no issue of conflicting loyalties.[32] The court further determined that if the nurses were found to be employees, the ratio of supervisors to employees would be reasonable.[33] Additionally, the court found that the charge nurses had no effective authority to discipline personnel, because although they had the ability to make recommendations, the conceded supervisors had complete authority to make all disciplinary decisions.[34] The court thus concluded that the nurses were not supervisors within the meaning of the Act.[35]

In 1993, in *Northcrest Nursing Home*, the Board affirmed the decision of the Regional Director that licensed practical nurses at a nursing home were not supervisors within the meaning of the Act.[36] In August, 1992, the Health Care and Social Service Union, SEIUO, AFL-CIO, filed a petition seeking representation of employees, including the LPNs, at the Northcrest Nursing Home.[37] The nursing home opposed the petition, claiming that the LPNs' supervisor status rendered them ineligible for representation.[38]

The Board concluded that the statute requires the resolution of three questions in considering whether an employee is a supervisor under the Act: (1) whether the employee has the authority to engage in any one of the twelve listed activities; (2) whether the exercise of the authority requires the use of independent judgment on the part of the employee; and (3) whether the employee holds the authority in the interest of the employer.[39] In analyzing whether the nurses were supervisors, the Board considered whether the nurses performed supervisory duties in the interest of the employer, or in the interest of the patients.[40] The Board reasoned that the LPNs were not supervisors despite performing certain duties which involved the exercise of supervisory authority, such as directing and evaluating aides, because the supervisory authority was so closely related to the welfare of the patients that the nurses exercised such authority incidental to patient care, and not "in the interest of the employer."[41] Thus, the Board

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[32] *See id.*

[33] *See id.* at 133, 132 L.R.R.M. at 2782.

[34] *See id.*

[35] *Children's Habilitation Center*, 887 F.2d at 134, 132 L.R.R.M. at 2783.

[36] 313 N.L.R.B. No. 54 at 19, 145 L.R.R.M. at 1233 (1993).

[37] *Id.* at 10, 145 L.R.R.M. at 1225.

[38] *Id.* at 10–11, 145 L.R.R.M. at 1225–26.

[39] *See id.* at 3, 145 L.R.R.M. at 1218–19.

[40] *See id.* at 2, 145 L.R.R.M. at 1217.

[41] *Northcrest Nursing Home*, 313 N.L.R.B. No. 54 at 15, 145 L.R.R.M. at 1229.

declined to characterize the nurses as supervisors within the meaning of the Act, and affirmed the decision of the Regional Director.[42]

During the *Survey* year, in *NLRB v. Health Care & Retirement Corp. of America*, the United States Supreme Court held that three LPNs who exercised independent authority in supervising patient care were supervisors under the Act.[43] The Court rejected the Board's distinction between supervision exercised in the interest of the patient and supervision exercised in the interest of the employer.[44] The Court concluded that because the patients were customers of the employer, supervisory authority exercised in connection with their care was in the interest of the employer.[45]

A nursing home discharged the three LPNs, who then filed a complaint with the Board alleging that their employer had committed unfair labor practices.[46] The nurses claimed that their participation in activities protected by the Act resulted in their discharge.[47] The Board subsequently issued a complaint in May, 1989, accusing Health Care & Retirement Corporation ("HCR") of disciplining the LPNs for engaging in protected activities for the purposes of collective bargaining.[48]

At a hearing before an ALJ, HCR contended that the Act's protection did not extend to the nurses due to their status as supervisors.[49] The ALJ found that the nurses were employees, and thus entitled to the protection of the Act, but also found that HCR had not engaged in any unfair labor practices.[50] Following the hearing before the ALJ, the Board affirmed that the nurses were not supervisors within the meaning of the Act because they did not exercise supervisory authority in the interest of the employer, but rather engaged in supervisory activities in the interests of the patients by ensuring that they received quality care.[51] The Board additionally found that HCR had committed unfair labor practices.[52]

HCR appealed the Board's decision to the United States Court of Appeals for the Sixth Circuit, which vacated the Board's order, finding that the nurses' authority to assign and direct the duties of the nurses'

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[42] *Id.* at 19, 145 L.R.R.M. at 1233.

[43] 114 S. Ct. 1778, 1785 (1994).

[44] *Id.* at 1782.

[45] *Id.*

[46] *Health Care & Retirement Corp. of Am. v. NLRB*, 987 F.2d 1256, 1257–58, 142 L.R.R.M. 2728, 2728 (6th Cir. 1993), *aff'd* 114 S. Ct. 1778 (1994).

[47] *Id.* at 1258, 142 L.R.R.M. at 2728.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Health Care & Retirement Corp.*, 987 F.2d at 1258, 142 L.R.R.M. at 2729.

[52] *Id.*

aides granted them supervisory status under the Act.[53] The United States Supreme Court granted certiorari to review *Health Care & Retirement Corp.* to resolve the conflicts in the circuit courts over the validity of the Board's test for determining whether nurses who perform some supervisory duties are supervisors within the meaning of the Act.[54]

In affirming the Sixth Circuit's reversal of the Board's decision, the Court approved the Board's test for determining supervisor status, but disagreed with the Board's interpretation of the statutory phrase "in the interest of the employer."[55] The Court rejected the Board's assertion that supervisory authority exercised in conjunction with patient care is not in the interest of the employer.[56] In the present case, the Court found that the Board had again created a false dichotomy in attempting to distinguish between the interests of the patients and the interests of the employer.[57] The Court reasoned that because patient care is the business of a nursing home, the exercise of authority in the interest of the welfare of the patient is in the interest of the employer.[58]

The Court further found that the test, as applied by the Board, rendered portions of the definition of "supervisor" in section 2(11) of the Act meaningless.[59] Section 2(11) of the Act states that an employee who uses independent judgment to engage in any one of the twelve listed activities is a supervisor.[60] Under the Board's test, however, a nurse who exercises independent judgment to engage in direction of other employees might not be considered a supervisor.[61] The Court decided that the Board had limited the statutory definition in nurse

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[53] *Id.* at 1261, 142 L.R.R.M. at 2731.

[54] *Health Care & Retirement Corp.*, 114 S. Ct. at 1781. The Sixth Circuit Court of Appeals has rejected the Board's supervisory test as applied to nurses. *See, e.g., Health Care & Retirement Corp.*, 987 F.2d at 1261, 142 L.R.R.M. at 2731; Beverly California Corp. v. NLRB, 970 F.2d 1548, 1556, 140 L.R.R.M 2961, 2967 (6th Cir. 1992). The Second, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals have accepted the Board's test. *See, e.g.*, Waverly-Cedar Falls Health Care Ctr. v. NLRB, 933 F.2d 626, 631, 137 L.R.R.M. 2393, 2397 (8th Cir. 1991); NLRB v. Walker County Medical Ctr., Inc., 722 F.2d 1535, 1542, 115 L.R.R.M. 2553, 2559 (11th Cir. 1984); NLRB v. Res-Care, Inc., 705 F.2d 1461, 1472, 113 L.R.R.M. 2336, 2343 (7th Cir. 1983); Misericordia Hosp. Medical Ctr. v. NLRB, 623 F.2d 808, 818, 104 L.R.R.M. 2666, 2674 (2d Cir. 1980); NLRB v. St. Francis Hospital of Lynnwood, 601 F.2d 404, 422, 101 L.R.R.M. 2943, 2956 (9th Cir. 1979).

[55] *Health Care & Retirement Corp.*, 114 S. Ct. at 1780, 1782.

[56] *See id.* at 1782. Previously, in *NLRB v. Yeshiva University*, the Court rejected the same interpretation of the phrase as applied in a university setting. *See* 444 U.S. 672, 688, 103 L.R.R.M. 2527, 2533 (1980); *see supra* notes 8–17 and accompanying text.

[57] *Health Care & Retirement Corp.*, 114 S. Ct. at 1782.

[58] *Id.*

[59] 29 U.S.C. § 152(11); *Health Care & Retirement Corp.*, 114 S. Ct. at 1783.

[60] 29 U.S.C. § 152(11).

[61] *Health Care & Retirement Corp.*, 114 S. Ct. at 1783.

cases to the extent that only nurses who exercised authority in relation to another employee's job status or salary would be deemed supervisors.[62] The Court found no justification for such limitation of the statutory definition of "supervisor" in the health care field, and accordingly found application of the test in this manner unacceptable.[63]

The Court also rejected the Board's non-statutory arguments for approval of its test.[64] The Board first argued that the test should stand because granting organizational rights to nurses who exercise supervisory authority in relation to patient care would be consistent with the purpose of the supervisor exception of avoiding conflicting loyalties.[65] The Court reasoned that even in the absence of danger of divided loyalty, the Board must enforce the Act according to its own terms, and the Board cannot manipulate the language of the Act to serve its own goals.[66] The Court further rejected the assertion that granting organizational rights to nurses would not result in undivided loyalty.[67] Because nursing homes may want to implement policies in the interest of patient care that would be unfavorable to employees, the Court deemed it important that the nursing home owners be assured of the undivided loyalty of the nurse supervisors who direct the activities of those employees.[68] Thus, the Court concluded that the LPNs were supervisors within the meaning of the Act.[69]

Justice Ginsburg filed a dissenting opinion, in which Justices Blackmun, Stevens and Souter joined.[70] Justice Ginsburg accepted the Board's test and concluded that the ALJ correctly characterized the nurses as employees.[71] She reasoned that the nurses did not attain supervisory status because they spent an insignificant amount of time exercising supervisory authority as part of their duties, and they did not exercise supervisory authority with independent discretion, but in a very routine manner.[72] Justice Ginsburg approved of the Board's case-by-case adjudication of nurse employees who, incidental to their technical work, perform a limited supervisory role, and accepted the Board's "patient care analysis" approach as rational and consistent with

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[62] *See id.*
[63] *See id.*
[64] *Id.*
[65] *Id.*
[66] *See Health Care & Retirement Corp.*, 114 S. Ct. at 1783–84.
[67] *Id.* at 1784.
[68] *See id.*
[69] *Id.* at 1785.
[70] *Id.* (Ginsburg, J., dissenting).
[71] *Health Care & Retirement Corp.*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting).
[72] *See id.* at 1790 (Ginsburg, J., dissenting).

the purposes of the Act.[73] Justice Ginsburg contended that the Board's test correctly harmonizes the tension between the "supervisor" exclusion and "professional" inclusion provisions by focusing on the policy reasons behind the supervisor exclusion in determining whether a nurse is a supervisor.[74] She stated that the application of this test will result in a nurse being considered a supervisor only when his or her supervisory duties reflect managerial authority exercised in the interest of the employer, and not merely when a nurse exercises discretion regarding the technical decisions required for patient care.[75]

Justice Ginsburg further argued that construing the term "supervisor" broadly, as the Court's holding requires, would result in most professionals being deemed supervisors and denied protection under the Act.[76] She reiterated that Congress specifically drafted the Act to include professionals in its protections.[77] Thus, interpreting the term supervisor to include all individuals who possess some supervisory authority and exercise independent judgment would directly conflict with congressional intent by eliminating most professional employees from coverage under the Act.[78]

Justice Ginsburg also stated that Congress intended the phrase "in the interest of the employer" to narrow the category of employees who are supervisors.[79] She argued that the Court's interpretation of the phrase will instead serve to expand that category so that virtually any duty performed during working hours could be characterized as "in the interest of the employer."[80] Justice Ginsburg concluded by expressing her concern for the broad impact of the Court's decision, not only on employees in the field of health care, but on individuals in all fields of employment.[81]

The Supreme Court's decision in *NLRB v. Health Care & Retirement Corp. of America* rejected the analysis of the "supervisor" provision of the Act that has been accepted by a majority of the circuit courts, and thus will greatly affect future cases involving nurses in those circuits.[82] The Court rejected the Board's method of interpreting the statutory provision by looking to the purpose of the provision, adopt-

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[73] *See id.* at 1786 (Ginsburg, J., dissenting).

[74] *See id.* at 1788 (Ginsburg, J., dissenting).

[75] *Id.* (Ginsburg, J., dissenting).

[76] *See Health Care & Retirement Corp.*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting).

[77] *See id.* at 1786, 1788 (Ginsburg, J., dissenting).

[78] *See id.* at 1786 (Ginsburg, J., dissenting).

[79] *See id.* at 1791 (Ginsburg, J., dissenting).

[80] *See id.* (Ginsburg, J., dissenting).

[81] *Health Care & Retirement Corp.*, 114 S. Ct. at 1792 (Ginsburg, J., dissenting).

[82] *Id.* at 1785. The Court's decision rejects the interpretation of section 2(3) of the Act

ing instead a rigid interpretation of the plain language of the statute.[83] This results in an interpretation of the statute that is clearly contrary to congressional intent, in that the broad interpretation of the scope of the "supervisor" exclusion provision will serve to greatly limit the application of the "professional" inclusion provision.[84] Although the two provisions are somewhat conflicting, by enacting the "professional" provision, Congress unequivocally voiced its intent to grant professional employees protection under the Act.[85] Since most professionals exercise some supervisory authority incidental to performance of professional duties, a broad interpretation of the "supervisor" provision, as was adopted by the Court, will result in most professional employees being denied coverage under the Act.[86] That is clearly contrary to Congress's intent in drafting the provision.[87]

The majority opinion suggested that this decision will have no effect outside of the health care field.[88] As Justice Ginsburg's dissenting opinion indicated, however, this decision will likely affect professional employees in all industries.[89] The tension created by the "professional" inclusion provision and the "supervisor" exclusion provision of the Act is not limited to health care workers, but rather affects all fields that employ professionals.[90] Although the majority stated that interpretation of the phrase "in the interest of the employer" is limited to nurse employee cases, it based much of its reasoning in *Health Care & Retirement Corp.* on the Court's interpretation of that phrase in *NLRB v. Yeshiva University*, a case involving professionals in the field of education.[91] As such, it is unreasonable to suggest that an interpretation of the phrase is necessary only in health care cases, and that the holding of *Health Care & Retirement Corp.* extends only to cases involving the field of health care.

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adopted by the Board, and by the Second, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals, and affirms the interpretation set forth by the Sixth Circuit Court of Appeals. *See supra* notes 54–55 and accompanying text.

[83] *See Health Care & Retirement Corp.*, 114 S. Ct. at 1783–84.

[84] *See id.* at 1791 (Ginsburg, J., dissenting).

[85] National Labor Relations Act, 29 U.S.C. § 152(11) (1988).

[86] *See* NLRB v. Res-Care, Inc., 705 F.2d 1461, 1465, 113 L.R.R.M. 2336, 2337 (7th Cir. 1983) (most professional employees, i.e. lawyers, teachers, doctors, exercise some supervisory authority incidental to performing professional duties).

[87] *Health Care & Retirement Corp.*, 114 S. Ct. at 1786 (Ginsburg, J., dissenting).

[88] *Id.* at 1785.

[89] *Id.* at 1792–93 (Ginsburg, J., dissenting).

[90] *Id.* at 1781.

[91] *See id.* at 1782; NLRB v. Yeshiva University, 444 U.S. 672, 688, 103 L.R.R.M. 2527, 2533 (1980).

The Court restated the position taken by the Sixth Circuit that it is up to Congress, and not the courts, to carve out an exception to the supervisor provision for the health care field that would eliminate the need for such an interpretation.[92] The Court itself recognized that its interpretation may affect the professional provision of the Act, but contends that the language of the Act cannot support the interpretation put forth by the Board.[93] In 1974, the Senate Labor Committee considered recommending enactment of such an exception, but failed to carry out the recommendation.[94] Thus, if the Court's interpretation of the "supervisor" provision truly conflicts with congressional intent, Congress may amend the Act to clarify the statutory language or include an exception for the health care or other fields that would eliminate the need for interpreting the phrase "in the interest of the employer."

In sum, in *NLRB v. Health Care & Retirement Corp. of America*, the United States Supreme Court rejected the Board's interpretation of the phrase "in the interest of the employer" as set forth in section 2(3) of the Act, concluding that supervisory authority exercised incidental to patient care is "in the interest of the employer."[95] Relying on *NLRB v. Yeshiva University*, the Court reasoned that supervisory authority that is exercised within the range of authorized business of the employer is exercised "in the interest of the employer."[96] This decision serves to broaden the scope of the provision for exclusion of supervisors from the Act, and if followed rigidly, could effectively nullify the provision for inclusion of professionals within the Act.

B. **Paid Union Organizers Are Not Protected as "Employees" Under the National Labor Relations Act:* Ultrasystems Western Constructors v. NLRB[1] *and* Town & Country Electric v. NLRB[2]

The National Labor Relations Act ("NLRA") protects, among other things, the rights of employees to bargain collectively and to join unions for that purpose.[3] To that end, section 8(a)(3) of the NLRA

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[92] *See Health Care & Retirement Corp.*, 114 S. Ct. at 1781.

[93] *See id.* at 1785.

[94] *See* S. REP. No. 93-766, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 3946, 3951.

[95] 114 S. Ct. at 1785.

[96] *Id.* at 1782; *Yeshiva*, 444 U.S. at 688, 103 L.R.R.M. at 2533.

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[1] 18 F.3d 251, 145 L.R.R.M. 2641 (4th Cir. 1994).

[2] Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696, 147 L.R.R.M. 2133 (8th Cir. Aug. 31, 1994).

[3] 29 U.S.C. § 157 (1991).

prohibits employers from discriminating against employees who are members of a union.[4] The protection of section 8(a)(3) extends only to those employees who fall within the definition of "employee" as set out in section 2(3) of the NLRA.[5]

Unions have often employed organizers to apply for positions within non-union companies for the purposes of unionization.[6] Non-union companies have historically opposed these efforts, and often fire employees they discover to be paid union organizers.[7] Similarly, during the application process, if a non-union employer discovered that an applicant was a paid organizer, that employer often refused to hire that applicant.[8] Consequently, the National Labor Relations Board ("NLRB" or "Board") and the federal courts have had to decide whether paid union organizers are "employees" as contemplated by section 2(3) of the NLRA, and thus entitled to the protection contained in section 8(a)(3) of the NLRA.[9]

The NLRB and several circuits of the United States Courts of Appeals have split over whether a paid union organizer is an "employee" as defined by section 2(3) of the NLRA.[10] In 1964, in *NLRB v.*

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[4] 29 U.S.C. § 158(a)(3) (1991). Section 8(a)(3) provides in relevant part: "It shall be an unfair labor practice for an employer . . . by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." *Id.*

[5] 29 U.S.C. § 152(3) (1991). Section 2(3) defines employee, in relevant part: "The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer . . . and shall include any individual whose work has ceased as a consequence of . . . or because of any unfair labor practice." *Id.* The United States Supreme Court in *Phelps Dodge v. NLRB* held that job applicants were protected by the statute. *See* 313 U.S. 177, 186–89, 8 L.R.R.M. 439, 442 (1941). The Court reasoned, as Judge Learned Hand had in the lower court decision, that there is "no greater limitation in denying [the employer] the power to discriminate in hiring, than in discharging." *Id.* at 187, 8 L.R.R.M. at 443.

[6] *See, e.g.*, Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1328, 140 L.R.R.M. 2745, 2745–46 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993); H.B. Zachry Co. v. NLRB, 886 F.2d 70, 71, 132 L.R.R.M. 2377, 2377–78 (4th Cir. 1989); NLRB v. Henlopen Mfg. Co., Inc., 599 F.2d 26, 28, 101 L.R.R.M. 2247, 2248 (2d Cir. 1979); NLRB v. Elias Bros. Big Boy, 327 F.2d 421, 424, 55 L.R.R.M. 2403, 2404 (6th Cir. 1964).

[7] *See, e.g.*, *Henlopen*, 599 F.2d at 28–29, 101 L.R.R.M. at 2248–49; *Big Boy*, 327 F.2d at 424, 55 L.R.R.M. at 2404.

[8] *See, e.g.*, *Willmar*, 968 F.2d at 1328, 140 L.R.R.M. at 2746; *Zachry*, 886 F.2d at 71–72, 132 L.R.R.M. at 2378; Sunland Constr. Co., Inc., 309 N.L.R.B. 1224, 1224, 142 L.R.R.M. 1025, 1027 (1992).

[9] *See, e.g.*, *Willmar*, 968 F.2d at 1329, 140 L.R.R.M. at 2746; *Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378; *Big Boy*, 327 F.2d at 423, 55 L.R.R.M. at 2403; *Sunland*, 309 N.L.R.B. at 1225, 142 L.R.R.M. at 1028.

[10] *Compare* Town & Country Elec., Inc. v. NLRB, Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696 at *11, 147 L.R.R.M. 2133, 2136 (8th Cir. Aug. 31, 1994) (holding that paid organizers are not "employees" under NLRB) *and* Ultrasystems W. Constructors, Inc. v. NLRB, 18 F.3d 251, 255, 145 L.R.R.M. 2641, 2644 (4th Cir. 1994) (holding that paid organizers are not

Elias Bros. Big Boy, the United States Court of Appeals for the Sixth Circuit held that a paid union organizer was not a bona fide "employee" within the meaning of section 2(3) of the NLRA.[11] Elias discharged a waitress from her position at the Elias Brother's Big Boy restaurant after the company discovered that a union was paying her to organize.[12] The waitress had met infrequently with the union's organization coordinator and earned fifteen dollars a week from the union while working for Elias.[13] The court considered the fact that the waitress had worked for the union prior to, and during, her employment with Elias dispositive, and as a result concluded that she was not a bona fide "employee" as defined by the NLRA.[14]

In the 1974 case of *Dee Knitting Mills*, the Board held that a union organizer did not lose employee status by being paid to organize for the union.[15] Dee employed the organizer to clean and examine sweaters made at the plant.[16] During the period of her employment, the International Ladies' Garment Workers' Union ("ILGWU") also paid the organizer to organize her fellow employees.[17] Dee fired the organizer three months after hiring her.[18] The Board, finding no evidence that the organizer took the job solely to organize, concluded that she was a bona fide "employee" as defined by section 2(3).[19]

One year later, in *Oak Apparel*, the Board again held that a paid union organizer was an "employee" within the meaning of the NLRA.[20]

"employees" under NLRB) *and Zachry*, 886 F.2d at 71, 132 L.R.R.M. at 2377 (holding that paid organizers are not "employees" under NLRB) *and Big Boy*, 327 F.2d at 427, 55 L.R.R.M. at 2407 (holding that paid organizers are not "employees" under NLRB) *with Willmar*, 968 F.2d at 1330–31, 140 L.R.R.M. at 2747 (holding that paid organizers are "employees" under NLRB) *and Henlopen*, 599 F.2d at 30, 101 L.R.R.M. at 2250 (holding that paid organizers are "employees" under NLRB) *and* Town & Country Elec., Inc., 309 N.L.R.B. 1250, 1250, 142 L.R.R.M. 1036, 1040 (1992) (holding that paid organizers are "employees" under NLRB), *enforcement denied sub. nom.* Town & Country Elec., Inc. v. NLRB, Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696, 147 L.R.R.M. 2133 (8th Cir. Aug. 31, 1994) *and Sunland*, 309 N.L.R.B. at 1224, 142 L.R.R.M. at 1026 (holding that paid organizers are "employees" under NLRB) *and* Oak Apparel, Inc., 218 N.L.R.B. 701, 701, 89 L.R.R.M. 1381, 1382 (1975) (holding that paid organizers are "employees" under NLRB) *and* Dee Knitting Mills, Inc., 214 N.L.R.B. 1041, 1041, 88 L.R.R.M. 1273, 1274–75 (1974) (holding that paid organizers are "employees" under NLRB), *enforced*, 538 F.2d 312, 93 L.R.R.M. 2336 (2d Cir. 1975).

[11] *Big Boy*, 327 F.2d at 424–25, 55 L.R.R.M. at 2404–05.

[12] *Id.* at 427, 55 L.R.R.M. at 2407.

[13] *Id.* at 424, 55 L.R.R.M. at 2404.

[14] *Id.* at 427, 55 L.R.R.M. at 2406–07.

[15] 214 N.L.R.B. at 1041, 88 L.R.R.M. at 1274–75.

[16] *Id.*, 88 L.R.R.M. at 1274.

[17] *Id.*

[18] *Id.*

[19] *Id.*, 88 L.R.R.M. at 1274–75.

[20] 218 N.L.R.B. at 701, 89 L.R.R.M. at 1382.

In that case, the ILGWU sent two professional organizers to Oak Apparel to assist the union in its efforts to organize the workers.[21] The company fired the two women when, in the company's view, the organizational efforts became disruptive to the other workers.[22] The Board stated that the definition of "employee" in section 2(3) of the NLRA should be interpreted broadly so as to include "the working class generally."[23] Because union organizers belong to the "working class," the Board concluded that the two organizers were "employees" and thus entitled to protection under section 8(a)(3) of the NLRA.[24]

In 1979, in *NLRB v. Henlopen Manufacturing Co.*, the United States Court of Appeals for the Second Circuit supported the Board's interpretation of section 2(3) by holding that a paid union organizer was an "employee" protected by the NLRA.[25] In *Henlopen*, the union paid an assembly line worker fifty dollars a week to organize Henlopen's employees.[26] Without explaining its reasoning, the court stated that a "paid union infiltrator" was a bona fide "employee" under the NLRA.[27]

In contrast, in the 1989 case *H.B. Zachry Co. v. NLRB*, the United States Court of Appeals for the Fourth Circuit held that a paid union organizer was not a bona fide "employee" under the terms of section 2(3) of the NLRA.[28] Barry Edwards worked for Zachry until 1980.[29] The company fired Edwards, but the NLRB ordered the company to reinstate him.[30] By the time the Board's ruling came down, however, the work at the job site where Edwards was employed had been completed.[31] With no work at his previous job site, Edwards applied for another job at a Zachry site, but the company refused to hire him.[32]

The *Zachry* court reasoned that an "employee" is a person who, while at work, is under the direction of a single employer.[33] The court concluded that Edwards was not a bona fide "employee" of Zachry

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[21] *Id.* at 702, 89 L.R.R.M. at 1382.

[22] *Id.* at 708, 89 L.R.R.M. at 1385 (findings of administrative law judge adopted by NLRB).

[23] *Id.* at 701, 89 L.R.R.M. at 1381.

[24] *See id.*, 89 L.R.R.M. at 1381–82.

[25] 599 F.2d 26, 30, 101 L.R.R.M. 2247, 2250 (2d Cir. 1979).

[26] *Id.* at 28, 101 L.R.R.M. at 2248.

[27] *Id.* at 30, 101 L.R.R.M. at 2250.

[28] 886 F.2d 70, 72, 132 L.R.R.M. 2377, 2378 (4th Cir. 1989).

[29] *See id.* at 71, 132 L.R.R.M. at 2377.

[30] *Id.*; *see also* H.B. Zachry Co., 261 N.L.R.B. 681, 686, 110 L.R.R.M. 1141, 1141 (1982) (NLRB found that Zachry's dismissal of Edwards violated § 8(a)(1) of the NLRA).

[31] *Zachry*, 886 F.2d at 71, 132 L.R.R.M. at 2377.

[32] *Id.*, 132 L.R.R.M. at 2377–78.

[33] *Id.* at 73, 132 L.R.R.M. at 2379.

because he worked for the company only to fulfill his duties to the union.[34] For Edwards, the Zachry job was a means to the end of performing his union job.[35] Using the same line of reasoning, the court concluded that Edwards was also not a bona fide applicant for employment, because Edwards was not in search of a job.[36] The court reasoned that he already had and would continue to have a job with the union.[37]

In addition, the *Zachry* court concluded that granting paid union organizers protection as "employees" under the NLRA would upset the careful balance struck by Congress in the NLRA.[38] The court cited to *NLRB v. Babcock & Wilcox Co.*, where the Supreme Court held that, under the NLRA, employers do not have to provide their facilities for unionization purposes.[39] The *Zachry* court reasoned that requiring a company to permit union organizers onto company property for organizational purposes because they are "applicants" or "employees" would render ineffective the protection offered to employers in the *Babcock* decision.[40] Additionally, the court stated that employees have a right to self-determination when deciding whether to unionize.[41] The court reasoned that forcing employers to hire union organizers, essentially paid by the union to vote in favor of unionization, would interfere with the employees' right to independently decide whether to unionize.[42]

Finally, the *Zachry* court noted that section 8(a)(2) of the NLRA makes it an unfair labor practice for a company to contribute financially to unions.[43] Because the salaries paid by the companies to the union organizers often relieve the union of some or all of its obligation to pay the organizer, the court reasoned that salaries paid to the organizers would subsidize the union in violation of section 8(a)(2) of the NLRA.[44] The *Zachry* court concluded that paid union organizers are not bona fide "employees" or "applicants" under the NLRA.[45]

In the three years following the *Zachry* decision, the Board and the United States Courts of Appeals for the District of Columbia and

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[34] *Id.*

[35] *See id.* at 74, 132 L.R.R.M. at 2379.

[36] *Zachry*, 886 F.2d at 73, 132 L.R.R.M. at 2379.

[37] *Id.*

[38] *Id.* at 74, 132 L.R.R.M. at 2380.

[39] *Id.* (citing NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 114, 38 L.R.R.M. 2001, 2004–05 (1956)).

[40] *Id.*

[41] *Zachry*, 886 F.2d at 74, 132 L.R.R.M. at 2380.

[42] *Id.*

[43] *Id.* at 75, 132 L.R.R.M. at 2380.

[44] *Id.*

[45] *Id.*

Third Circuit held that paid union organizers were "employees" as defined by section 2(3) of the NLRA.[46] In 1992, in *Willmar Electric Service v. NLRB*, the United States Court of Appeals for the District of Columbia upheld the NLRB's ruling that a paid union organizer was an "employee" for the purposes of section 2(3).[47] The organizer, a journeyman electrician, had just begun working as an organizer for the International Brotherhood of Electrical Workers when he applied to Willmar in 1988.[48] Willmar refused to consider his application.[49]

The court reasoned that under common law, a person may be the servant of two masters.[50] Additionally, the court dismissed Willmar's argument that a union organizer would be disloyal to the company.[51] The court stated that a company may discharge an employee for disloyalty under the NLRA, but only after that employee has actually been disloyal.[52] The court, therefore, concluded that a person simultaneously employed by a union and a company was an "employee" under section 2(3) of the NLRA, "leaving to another day" the issue of when employment by a union establishes such a risk of disloyalty that a non-union company can refuse to hire, or can choose to fire the union employee on that basis.[53]

Similarly in 1992, in *Sunland Construction Co.*, the NLRB held that paid union organizers were "employees" within the meaning of section 2(3) of the NLRA.[54] In *Sunland*, two union organizers applied, along

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[46] *See* Escada (USA), Inc. v. NLRB, 970 F.2d 898, 140 L.R.R.M. 2872 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845, 846, 139 L.R.R.M. 1131, 1131 (1991); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1328, 140 L.R.R.M. 2745, 2745 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993); Town & Country Elec., 309 N.L.R.B. 1250, 1250, 142 L.R.R.M. 1036, 1038 (1992), *enforcement denied sub. nom.* Town & Country Elec., Inc. v. NLRB, Nos. 92–3911, 93–1218, 1994 U.S. App. LEXIS 23696, 147 L.R.R.M. 2133 (8th Cir. Aug. 31, 1994); Sunland Constr. Co., 309 N.L.R.B. 1224, 1225, 142 L.R.R.M. 1025, 1027–28 (1992).

[47] 968 F.2d at 1328, 140 L.R.R.M. at 2745.

[48] *Id.*

[49] *Id.*, 140 L.R.R.M. at 2746.

[50] *Id.* at 1329–30, 140 L.R.R.M. at 2747 (employee can be servant of two masters, but service of one cannot involve abandonment of or conflict with service to other) (citing RESTATEMENT (SECOND) OF AGENCY § 226 (1958)).

[51] *Id.* at 1330, 140 L.R.R.M. at 2747.

[52] *Willmar*, 968 F.2d at 1330, 140 L.R.R.M. at 2747.

[53] *Id.* at 1330–31, 140 L.R.R.M. at 2747. During the same year the United States Court of Appeals for the Third Circuit, in *Escada (USA), Inc. v. NLRB*, upheld, without written opinion, an NLRB order that recognized paid union organizers as "employees" under § 2(3) of the NLRA. 970 F.2d 898, 140 L.R.R.M. 2872 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845, 846, 139 L.R.R.M. 1131, 1131 (1991).

[54] 309 N.L.R.B. 1224, 1226, 142 L.R.R.M. 1025, 1028 (1992). The Board heard *Sunland* concurrently with *Town & Country*, and issued a similarly reasoned concurring decision. *See id.* at 1224 n.1, 142 L.R.R.M. at 1026 n.1; Town & Country Elec., 309 N.L.R.B. 1250, 1250 142 L.R.R.M. 1036, 1038 (1992), *enforcement denied sub. nom.* Town & Country Elec., Inc. v. NLRB,

with approximately ninety other union members, for pipefitter/welder positions at Sunland.[55] The company failed to hire any of the union members, including the two organizers.[56] Nevertheless, the company did hire non-union welders and pipefitters.[57]

The Board reasoned that the definition of "employee" in section 2(3) of the NLRA is "sufficiently expansive to encompass paid union organizers."[58] The Board cited the United States Supreme Court decision in *Sure-Tan, Inc. v. NLRB*, where the Court stated that the section 2(3) definition should be interpreted broadly to include any employee.[59] Because the Board had already decided that union organizers did not fall within one of the statutory exceptions, it concluded that union organizers were "employees" under section 2(3) of the NLRA.[60] The Board rejected the policy concerns raised in *Zachry* and accordingly embraced the D.C. Circuit's view of employee loyalty in *Willmar* with one exception.[61] Concerned with potential conflicts of interest and issues of disloyalty, the Board in *Sunland* reasoned that during a strike a paid union organizer is not an "employee" within the meaning of section 2(3) of the NLRA, and thus stated that an employer may refuse to hire a union organizer during a strike.[62] In all other situations, the Board concluded, paid union organizers are "employees" within the meaning of the NLRA.[63]

During the *Survey* year, in *Ultrasystems Western Constructors, Inc. v. NLRB* and *Town & Country Electric, Inc. v. NLRB*, the United States Courts of Appeals for the Fourth and Eighth Circuits held that paid union organizers are not "employees" as defined by section 2(3) of the NLRA and therefore do not merit the protection of section 8(a)(3).[64]

Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696, 147 L.R.R.M. 2133 (8th Cir. Aug. 31, 1994). Because the appeal of *Town & Country* was decided during the *Survey* year, it will be discussed along with the other *Survey* year case. *See infra* notes 85–104 and accompanying text.

[55] 309 N.L.R.B. at 1224, 142 L.R.R.M. at 1027. Creeden's and Yakomowicz's qualifications were not in dispute. *Id.* at n.5, 142 L.R.R.M. at 1027 n.5.

[56] *Id.*

[57] *Id.*

[58] *Id.* at 1226, 142 L.R.R.M. at 1028.

[59] *Id.* at 1227, 142 L.R.R.M. at 1029 (citing Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891, 116 L.R.R.M. 2857, 2860 (1984)).

[60] *Sunland*, 309 N.L.R.B. at 1226, 142 L.R.R.M. at 1028.

[61] *See id.* at 1228–30, 142 L.R.R.M. at 1030–32. In *Willmar* the United States Court of Appeals for the District of Columbia Circuit acknowledged that under the common law an employee can be the servant of two masters, and left questions of loyalty to be decided at a later date. 968 F.2d at 1329–31, 140 L.R.R.M. at 2747.

[62] 309 N.L.R.B. at 1230–31, 142 L.R.R.M. at 1032–33.

[63] *See id.* at 1224, 142 L.R.R.M. at 1026.

[64] Town & Country Elec., Inc. v. NLRB, Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696,

In *Ultrasystems*, the United States Court of Appeals for the Fourth Circuit upheld its earlier ruling in *Zachry* by holding that Ultrasystems did not violate the NLRA in refusing to hire a full-time paid union organizer because, in the court's view, a union organizer is not a bona fide applicant for employment.[65] In *Town & Country*, the United States Court of Appeals for the Eighth Circuit adopted the reasoning in *Zachry* by holding that Town & Country did not violate the NLRA by refusing to hire two paid union organizers, and by later firing a union member who announced his intentions to organize for the union.[66]

In *Ultrasystems*, the Boilermakers Union along with the United States Association of Journeymen targeted Ultrasystems Western Constructors, Inc. ("Ultrasystems") for unionization.[67] The Union assigned William Creeden, a full time union employee, to organize the effort.[68] He sent sixty-six applications to Ultrasystems, including his own and thirteen others for a job site in Rocklin, California, and fifty-two for a job site in Bakersfield, California.[69] Ultrasystems needed welders, yet hired none of the sixty-six union applicants.[70]

In *Ultrasystems*, the Fourth Circuit upheld its earlier ruling in *Zachry* by holding that a union organizer cannot be considered a bona fide applicant for employment.[71] Specifically adopting its definitional reasoning in *Zachry*, the court stated that an application from an organizer is "qualitatively different" than that of a bona fide applicant because the union organizer was not in search of a job with the usual expectations of employment.[72] The court explained that because a union organizer would work for and be paid by the union during the same hours that he or she worked for the company, his or her expectations of employment differed from that of a bona fide applicant.[73] According to the court, a bona fide applicant has the expectation of financial compensation from his or her employment with the company, while union organizers are not as dependant on those wages because the union will compensate them whether or not they are hired.[74] The

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at *11, 147 L.R.R.M. 2133, 2136 (8th Cir. Aug. 31, 1994); Ultrasystems W. Constructors, Inc. v. NLRB, 18 F.3d 251, 255, 145 L.R.R.M. 2641, 2644 (4th Cir. 1994).

[65] 18 F.3d at 255, 145 L.R.R.M. at 2644.

[66] 1994 U.S. App. LEXIS 23696, at *8–9, 11, 147 L.R.R.M. at 2135–36.

[67] 18 F.3d at 253, 145 L.R.R.M. at 2642.

[68] *Id.* William Creeden was also the paid union organizer who was at issue in the Board's decision in *Sunland*. *See Sunland*, 309 N.L.R.B. at 1224, 142 L.R.R.M. at 1027.

[69] *Ultrasystems*, 18 F.3d at 253, 145 L.R.R.M. at 2642.

[70] *Id.*

[71] *Id.* at 254–55, 145 L.R.R.M. at 2643–44.

[72] *Id.* at 254, 145 L.R.R.M. at 2643; *see also* H.B. Zachry Co. v. NLRB, 886 F.2d 70, 72–74, 132 L.R.R.M. 2377, 2378–79 (4th Cir. 1989).

[73] *Ultrasystems*, 18 F.3d at 254, 145 L.R.R.M. at 2643.

[74] *Id.* at 254, 145 L.R.R.M. at 2642.

court added that a bona fide applicant expects to have the terms of his or her employment determined by the needs and wishes of the employer.[75] Conversely, the court explained that the organizational effort and the union would determine the nature and duration of a paid union organizer's employment.[76]

The court in *Ultrasystems* also restated the policy concerns set out in the *Zachry* decision.[77] The court asserted once again that permitting a paid union organizer to obtain the protection of the NLRA as an "employee" would upset the balance struck by Congress in the relationships between employers and unions.[78] Additionally, the court restated its concern that granting paid union organizers "employee" status would interfere with employees' rights to decide for themselves whether to join the union.[79]

The court went on to state that the "factual prerequisites" for the holding in *Zachry* were present in *Ultrasystems*.[80] The court first noted that Creeden was, at the time he applied, employed by the union and intended to remain so employed if and when he got a job from Ultrasystems.[81] Secondly, the court emphasized that the union intended to continue Creeden's employment, notwithstanding his potential employment with Ultrasystems.[82] Based on these facts, and the court's reasoning, the Fourth Circuit refused to revisit its holding in *Zachry*, and held that a paid union organizer is not an "employee" as defined by section 2(3) of the NLRA, and thus not entitled to the protection of section 8(a)(3) of the NLRA.[83]

In *Town & Country*, the Electricians' Union authorized its members to work at non-union job sites for the purposes of organization.[84] At the same time, Town & Country Electric ("Town & Country"), a Wisconsin company, won a contract in International Falls, Minnesota.[85] Minnesota law required Town & Country to hire one electrician licensed in Minnesota for every two non-Minnesota licensed electricians

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[75] *Id.*

[76] *Id.*

[77] *Id.* at 254, 145 L.R.R.M. at 2643; *see also Zachry*, 886 F.2d at 74–75, 132 L.R.R.M. at 2379–80 (under NLRA employers do not have to provide their facilities for unionization purposes).

[78] *Ultrasystems*, 18 F.3d at 254, 145 L.R.R.M. at 2643.

[79] *Id.*

[80] *Id.* at 254–55, 145 L.R.R.M. at 2643; *see also Zachry*, 886 F.2d at 74–75, 132 L.R.R.M. at 2379–80.

[81] *Ultrasystems*, 18 F.3d at 254–55, 145 L.R.R.M. at 2643.

[82] *Id.* The court also noted that, because of *Zachry*, the ALJ was not convinced that Creeden was a bona fide applicant. *Id.*

[83] *Id.* at 255, 145 L.R.R.M. at 2644.

[84] Town & Country Elec., Inc. v. NLRB, Nos. 92–3911, 93–1218, 1994 U.S. App. LEXIS 23696, at *3, 147 L.R.R.M. 2133, 2135–36 (8th Cir. Aug. 31, 1994).

[85] *Id.* at *1, 147 L.R.R.M. at 2134.

on the job site.[86] Since it had no electricians licensed in Minnesota on staff, Town & Country enlisted the services of Ameristaff, a temporary employment agency.[87] Several union members arrived at the interviews arranged by Ameristaff, but Town & Country only interviewed two of the union members.[88] Town & Country hired one of the two members, Malcolm Hansen, as a temporary employee.[89] Once on the job site, Hansen announced to his fellow employees that his purpose was to organize for the union and actively began to recruit new members.[90] After hiring Hansen, Town & Country learned that temporary employees did not satisfy the Minnesota licensing requirement, and as a result, they fired Hansen and also refused to hire him on a permanent basis.[91] The refusal to re-hire Hansen and the refusal to consider the nine other union members that attended the Ameristaff interviews provided the basis for the claim against Town & Country.[92]

In *Town & Country*, the United States Court of Appeals for the Eighth Circuit adopted the Fourth Circuit's reasoning stated in *Zachry*.[93] The Eighth Circuit court reasoned that an organizer is not in search of a job when he or she makes an application, because he or she already has a job with the union.[94] The court stated that the organizers wanted to work for Town & Country not for financial gain, but to organize its workers.[95] This fundamental difference in expectations between bona fide applicants and union organizers caused the court to conclude that union organizers are not "employees" under the NLRA.[96] The court also stated that a union organizer will follow the mandates of the union even in cases where following union mandates puts the organizer in conflict with the company-employer.[97] The court stated that although an employee can be the servant of two masters, the service of one can not involve abandonment of or conflict with service to the other.[98] To grant paid union organizers protection under the terms of the NLRA would, in the Eighth Circuit's view, violate this widely held common law principle.[99]

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[86] *Id.* at *1–2, 147 L.R.R.M. at 2134.
[87] *Id.* at *2, 147 L.R.R.M. at 2134.
[88] *Id.* at *2–3, 147 L.R.R.M. at 2134.
[89] *Town & Country*, 1994 U.S. App. LEXIS 23696, at *3, 147 L.R.R.M. at 2134.
[90] *Id.* at *4, 147 L.R.R.M. at 2134.
[91] *Id.*
[92] *See id.* at *4–5, 147 L.R.R.M. at 2134–35.
[93] *Id.* at *8–9, 147 L.R.R.M. at 2135–36; *see also Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378.
[94] *Town & Country*, 1994 U.S. App. LEXIS 23696 at *10–11, 147 L.R.R.M. at 2136.
[95] *Id.* at *11, 147 L.R.R.M. at 2136.
[96] *See id.*
[97] *Id.*
[98] *Id.* at *10, 147 L.R.R.M. 2136 (citing RESTATEMENT (SECOND) OF AGENCY § 226 (1958)).
[99] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *10–11, 147 L.R.R.M. at 2136.

As an example, the court stated that a union organizer has reduced incentive to be a good employee, because if fired, he or she can simply return to a full time position with the union.[100] The court noted that the organizer may actually "relish being discharged," because then the union can bring a suit against the employer alleging discrimination based on the organizational efforts.[101] This caused the *Town & Country* court to conclude that paid union organizers were not "employees" under the NLRA, and thus not protected against discrimination based on union membership.[102] Based on the same reasoning, the court further held that the unpaid and part-time union organizers that attended the interviews, including Hansen, did not merit the NLRA's protection because the union controlled them, and they only attempted to work for Town & Country for organizational purposes.[103]

The *Survey* cases represent what continues to be an unsettled and divisive issue among the United States Courts of Appeals. Last year, the *Boston College Law Review Annual Survey of Labor and Employment Law* analyzed this issue by looking at both the *Sunland* and *Town & Country* Board decisions.[104] The 1993 *Survey* noted that, although the Board reaffirmed its rulings that paid organizers are "employees" under the NLRA, the split among the circuits made this a critical and uncertain issue in labor law practice.[105] As indicated in last year's *Survey*, without specific guidance from the Supreme Court to the contrary, the Board and the United States Courts of Appeals for the Second, Third and District of Columbia Circuits will probably continue to hold that paid union organizers are "employees" as defined by section 2(3) of the NLRA.[106] Likewise, the United States Courts of Appeals for the Fourth, Sixth and Eighth Circuits will almost certainly continue to hold the exact opposite.[107]

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[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at *11–12, 147 L.R.R.M. at 2136.

[104] Malcolm A.H. Stewart, Case Note, *Status of Paid Union-Organizers as "Employees" Under the National Labor Relations Act:* Sunland Construction Co. *and* Town & Country Electric, 35 B.C. L. REV. 351, 363–65 (1994).

[105] *Id.*

[106] Absent direction from the Supreme Court to the contrary, it seems likely that the following circuits and the Board will continue to hold that paid organizers are "employees" under the NLRA. *See generally* Escada (USA), Inc. v. NLRB, 970 F.2d 898, 140 L.R.R.M. 2872 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845, 139 L.R.R.M. 1131 (1991); Willmar Elec. Serv. v. NLRB, 968 F.2d 1327, 140 L.R.R.M. 2745 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993); NLRB v. Henlopen Mfg. Co., 599 F.2d 26, 101 L.R.R.M. 2247 (2d Cir. 1979); Sunland Constr. Co., 309 N.L.R.B. 1224, 142 L.R.R.M. 1025, 1027 (1992).

[107] Absent direction from the Supreme Court to the contrary, it seems likely that the following circuits will continue to hold that paid organizers are not "employees" under the NLRA. *See*

The two *Survey* cases have not added any new arguments to the debate over this issue. Nevertheless they have clarified and reinforced the reasoning used by the coalition of the circuits that have repeatedly found that paid union organizers are not "employees" under the NLRA.[108] After the Board's decisions in *Sunland* and *Town & Country*, some predicted that the circuits that traditionally opposed categorizing paid organizers as "employees" would reverse their positions and align themselves with the Board and similarly reasoned circuits.[109] This did not occur.[110] As a result, a legitimate need for clarification of the issue by the Supreme Court has now arisen.

Additionally, the Eighth Circuit's holding in *Town & Country* increases the number of circuits opposed to considering paid organizers as "employees."[111] Thus, there is no clear majority or minority view on this issue.[112] Further, the Eighth Circuit went beyond any past decision by holding that paid as well as unpaid and part-time organizers were not "employees" under the NLRA.[113] This may represent a

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generally Ultrasystems W. Constructors, Inc. v. NLRB, 18 F.3d 251, 145 L.R.R.M. 2641 (4th Cir. 1994); Town & Country Elec., Inc. v. NLRB, Nos. 92-3911, 93-1218, 1994 U.S. App. LEXIS 23696, 147 L.R.R.M. 2133 (8th Cir. Aug. 31, 1994); H.B. Zachry Co. v. NLRB, 886 F.2d 70, 132 L.R.R.M. 2377 (4th Cir. 1989); NLRB v. Elias Bros. Big Boy, 327 F.2d 421, 55 L.R.R.M. 2403 (6th Cir. 1964).

[108] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11-12, 147 L.R.R.M. at 2136; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644; *Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378; *Big Boy*, 327 F.2d at 427, 55 L.R.R.M. at 2407.

[109] Stewart, *supra* note 104, at 364.

[110] *See Town & Country*, 1994 U.S. App. LEXIS 23696 at *11-12, 147 L.R.R.M. at 2136; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644.

[111] See *supra* note 107 for the circuits that hold that a paid union organizer is not an "employee" under the NLRA.

[112] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11-12, 147 L.R.R.M. at 2136 (Eighth Circuit held that a paid organizer is not protected by the NLRA); *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644 (Fourth Circuit held that a paid organizer is not protected by the NLRA); Escada (USA), Inc. v. NLRB, 970 F.2d 898, 898, 140 L.R.R.M. 2872, 2872 (3d Cir. 1992), *enforcing* 304 N.L.R.B. 845, 846, 139 L.R.R.M. 1131, 1131 (1991) (Third Circuit, enforcing a Board ruling without opinion, held that a paid organizer is protected by the NLRA); Willmar Elec. Serv., Inc. v. NLRB, 968 F.2d 1327, 1328, 140 L.R.R.M. 2745, 2745 (D.C. Cir. 1992), *cert. denied*, 113 S. Ct. 1252, 142 L.R.R.M. 2584 (1993) (D.C. Circuit held that a paid organizer is protected by the NLRA); *Zachry*, 886 F.2d at 72, 132 L.R.R.M. at 2378 (Fourth Circuit held that a paid organizer is not protected by the NLRA); NLRB v. Henlopen Mfg. Co., Inc., 599 F.2d 26, 30, 101 L.R.R.M. 2247, 2249 (2d Cir. 1979) (Second Circuit held that a paid organizer is protected by the NLRA); *Big Boy*, 327 F.2d at 427, 55 L.R.R.M. at 2407 (Sixth Circuit held that a paid organizer is not protected by the NLRA). This breakdown amounts to three circuits that include paid organizers in the protected class of "employees" as defined by section 2(3) of the NLRA, and three circuits that do not. Only the Board's repeated findings that paid organizers are protected by the NLRA breaks the stalemate to create some semblance of a majority view. *See, e.g.*, *Sunland*, 309 N.L.R.B. at 1224, 142 L.R.R.M. at 1026; Dee Knitting Mills, Inc., 214 N.L.R.B. 1041, 1041, 88 L.R.R.M. 1273, 1274 (1974), *enforced*, 538 F.2d 312, 93 L.R.R.M. 2336 (2d Cir. 1975).

[113] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11-12, 147 L.R.R.M. at 2136.

swing in the conventional wisdom on this issue, and may also indicate an increased willingness on the part of the circuits to exclude groups of "employees" from the class protected by the NLRA.[114] Such a swing in the traditional approach to this issue may attract the attention of the Supreme Court and provide it with added incentive to grant certiorari to an appeal involving this issue.

If the Supreme Court were to hear an appeal on this issue it is difficult to predict how the Court would decide. Nevertheless, in *Sure-Tan* and *Phelps Dodge* the Court showed its willingness to interpret the definition of "employee" in section 2(3) of the NLRA very broadly.[115] If the Court continued that approach on this issue, it is quite conceivable that it would support the inclusion of paid organizers into the section 2(3) definition of "employee." Nevertheless, *Ultrasystems* and *Town & Country* may represent a pro-employer shift in the federal judiciary resulting from the Reagan/Bush appointments.[116] This shift may have reached the Supreme Court, and could result in Supreme Court support for the view that paid organizers do not fall within the protected class of "employees" as defined by the NLRA.[117]

To conclude, in *Ultrasystems* and *Town & Country*, the United States Courts of Appeals for the Fourth and Eighth Circuits held that paid union organizers are not protected by the NLRA because they do not fall within the protected class of "employees" as defined by section

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[114] *See id.*; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644.

[115] *See* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 891, 116 L.R.R.M. 2857, 2860 (1984); Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 186–87, 8 L.R.R.M. 439, 442–43 (1941).

[116] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11–12, 147 L.R.R.M. at 2136; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644. The *Sure-Tan* and *Phelps Dodge* cases originated from a Supreme Court that was decidedly more pro-labor than the current Court. The Reagan/Bush Court, crafted in the 1980s and 1990s, is more conservative and pro-employer than the Court in 1984 in *Sure-Tan* and 1941 in *Phelps Dodge*.

[117] A recent Supreme Court decision in *Director, Office of Workers' Compensation Programs, Dep't of Labor v. Greenwhich Collieries* highlighted the Court's more pro-employer tendency when it abandoned a long standing pro-labor approach to an entire class of employer/employee disputes. *See* No. 93–744, 1994 U.S. LEXIS 4669, at *18–21 (U.S. June 20, 1994). In *Greenwhich*, Justice O'Connor, joined by Justices Rehnquist, Scalia, Kennedy, Thomas and Ginsburg, reexamined the burden of proof standard that should be applied to employee's claims under the Black Lung Benefits Act (BLBA). *Id.* The Court ruled that the claimant-employee bears the burden of proof. *Id.* Although not unusual, this ruling did reject the Supreme Court's previous holding that employers bore the burden of proof. *Id.*; *see also* NLRB v. Transportation Management Corp., 462 U.S. 363, 363 (1983). The holding in *Greenwhich* makes claims brought by employees under the BLBA much more difficult to win, and thus the case represents a pro-employer outlook. *See* 1994 U.S. LEXIS 4669, at *18–21. With the Supreme Court abandoning its old pro-labor precedent, and with several lower federal courts (also dominated by Reagan/Bush appointees) taking a pro-employer position by excluding paid organizers from the definition of "employees" in the NLRA, it is possible that when the Supreme Court is confronted with the organizer issue, it may hold that paid organizers are not "employees" as defined by the NLRA.

2(3) of the NLRA.[118] Both courts reasoned that including paid organizers within the definition would subvert congressional intent as well as sound public policy expressed by the common law.[119] These holdings continue a long-standing split within the circuits, and thus necessitate clarification by the Supreme Court.

II. PREEMPTION

A. **Section 301 of the LMRA Does Not Require Preemption of a Minimum State Labor Standard if the Legal Character of the Claim is Independent of the Rights in a Collective Bargaining Agreement:* Livadas v. Bradshaw[1]

Federal labor law, under both the National Labor Relations Act of 1935 ("NLRA") and the Labor-Management Relations Act of 1947 ("LMRA"), protects the rights of employees to engage in collective bargaining and encourages reliance on economic self-help in resolving labor disputes by both employees and employers.[2] Federal labor law also provides protection for employees and employers from state interference in labor relationships.[3] This protection arose through the judicial development of preemption principles in the interpretation and application of congressional intent in drafting federal labor law.[4]

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[118] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11–12, 147 L.R.R.M. at 2136; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644.

[119] *See Town & Country*, 1994 U.S. App. LEXIS 23696, at *11–12, 147 L.R.R.M. at 2136; *Ultrasystems*, 18 F.3d at 255, 145 L.R.R.M. at 2644.

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[1] 114 S. Ct. 2068, 146 L.R.R.M. 2513 (1994).

[2] 29 U.S.C. §§ 141–197 (1988) (in particular, § 157 pertains to rights of employees); *see* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 24, 1 L.R.R.M. 703, 704 (1937).

[3] *See* Golden State Transit Corp. v. City of Los Angeles, 475 U.S. 608, 619, 121 L.R.R.M. 3233, 3238 (1985) (hereinafter *Golden State I*) (city conditioned franchise renewal on resolution of settlement dispute, and Court found city's action preempted by NLRA because condition interfered with bargaining positions); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 246, 43 L.R.R.M. 2838, 2842 (1956) (state was enjoined from blocking union picket).

[4] *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104, 49 L.R.R.M. 2717, 2721 (1962). Federal labor preemption jurisprudence falls into two main categories: § 301 of the LMRA, and preemption of state interference with the policies of the NLRA. *See* International Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n, 427 U.S. 132, 148–49, 92 L.R.R.M. 2881, 2887 (1976); *Lucas Flour Co.*, 369 U.S. at 104, 49 L.R.R.M. at 2721; *Garmon*, 359 U.S. at 246–47, 43 L.R.R.M. at 2842. Section 301 preemption requires consistency in the interpretation and application of collective bargaining agreements and therefore precludes state interpretation of the agreements. *See* 29 U.S.C. § 185 (1988); *Lucas Flour Co.*, 369 U.S. at 104, 49 L.R.R.M. at 2721. The second category of preemption principles under federal labor law seeks to limit state interference with the goals and objectives of the NLRA as laid out in § 7 and § 8 of the Act. *See* 29 U.S.C. §§ 157–58 (1988). Federal law preempts state action that interferes

One preemption principle of federal labor law ensures the existence of state minimum labor standards.[5] The United States Supreme Court has held that Congress did not intend for federal labor law to remove minimum state labor protections from employees who choose to bargain collectively.[6] Rather, according to the Supreme Court, Congress envisioned that federal labor law would coexist with minimum state labor rights.[7] Therefore, federal labor law does not preempt minimum state labor standards that do not interfere with collective bargaining.[8] In addition, the Supreme Court has held that denying employees covered by collective bargaining agreements rights that all other citizens in the state enjoy obstructs the ability to bargain collectively and rely on economic self-help.[9] For that reason, federal labor law preempts this type of state action because it subverts Congress's intent of protecting such employees.[10]

The enforcement of minimum state labor standards occasionally conflicts with another federal labor law preemption principal, section 301 of the LMRA.[11] Under section 301 preemption jurisprudence, the Supreme Court has recognized the need for consistency and uniformity in the interpretation and application of collective bargaining agreements.[12] In order to ensure this consistency, the Supreme Court has

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with the right to bargain collectively or the use of economic weapons of self-help under these principles. *See Machinists*, 427 U.S. at 149, 92 L.R.R.M. at 2887; Nash v. Florida Indus. Comm'n, 389 U.S. 235, 239, 66 L.R.R.M. 2625, 2626 (1967); *Garmon*, 359 U.S. at 245, 43 L.R.R.M. at 2842.

[5] *See* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409, 128 L.R.R.M. 2521, 2525 (1988); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 7, 125 L.R.R.M. 2455, 2457 (1987); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 754–55, 119 L.R.R.M. 2569, 2581 (1985); *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626.

[6] *Fort Halifax*, 482 U.S. at 21, 125 L.R.R.M. at 2463; *Metropolitan Life*, 471 U.S. at 754–55, 119 L.R.R.M. at 2581.

[7] *Metropolitan Life*, 471 U.S. at 756, 119 L.R.R.M. at 2582.

[8] *Fort Halifax*, 482 U.S. at 7, 125 L.R.R.M. at 2457; *Metropolitan Life*, 471 U.S. at 757, 119 L.R.R.M. at 2582.

[9] *See* Livadas v. Bradshaw, 114 S. Ct. 2068, 2074, 146 L.R.R.M. 2513, 2517 (1994); *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626.

[10] *See Livadas*, 114 S. Ct. at 2074, 146 L.R.R.M. at 2517; *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626.

[11] Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 408 n.7, 128 L.R.R.M. 2521, 2525 n.7 (1988); *see* Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352 (1985).

[12] Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 103, 49 L.R.R.M. 2717, 2721 (1962). Section 301 of the LMRA provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185.

interpreted section 301 to require the development of a federal common law with respect to collective bargaining agreements.[13] Therefore, section 301 requires preemption of a state claim that requires state court interpretation or application of a collective bargaining agreement.[14] Preemption of these state claims may run counter to the rights and duties created by minimum state labor standards.[15] Because of this conflict, the Supreme Court has struggled with striking a balance between these two important principles.[16]

In 1967, in *Nash v. Florida Industrial Commission*, the United States Supreme Court unanimously held that federal labor law prevented a state from discriminating against employees protected by collective bargaining agreements with respect to a state substantive right.[17] The Court determined that federal labor policy preempted a Florida unemployment compensation law that disqualified an individual from receiving benefits for unemployment resulting from a labor dispute.[18] The Florida law, the Court reasoned, left a party with a choice between the ability to collect unemployment compensation or bargain collectively.[19] The Court asserted that the result of this "choice" interfered with the policies behind the NLRA because it deterred reliance on the NLRA and impeded the use of economic self-help in labor disputes.[20] For that reason, the Court held that federal policy preempted the Florida unemployment compensation law.[21]

In 1985, in *Metropolitan Life Insurance Co. v. Massachusetts*, the United States Supreme Court held that minimum state labor standards exist independently of collective bargaining agreements and the NLRA does not preempt these standards unless they are inconsistent with its goals and hence frustrate its purpose.[22] In *Metropolitan Life*, a Massa-

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[13] *See Lucas Flour Co.*, 369 U.S. at 104, 49 L.R.R.M. at 2721. In that case, a union called a strike to force an employer to rehire an employee. *Id.* at 97, 49 L.R.R.M. at 2719. The Supreme Court determined that incompatible doctrines of local law must yield to an emerging federal common law with respect to collective bargaining agreements. *Id.* at 104, 49 L.R.R.M. at 2721. Therefore, the Court held that the strike violated federal labor law as contrary to the collective bargaining agreement. *Id.* at 106, 49 L.R.R.M. at 2722.

[14] *See Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53; *Lucas Flour Co.*, 369 U.S. at 104, 49 L.R.R.M. at 2721.

[15] *Lingle*, 486 U.S. at 408 n.7, 128 L.R.R.M. at 2525 n.7; *see Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352.

[16] *See Lingle*, 486 U.S. at 408 n.7, 128 L.R.R.M. at 2525 n.7.

[17] 389 U.S. 235, 239, 66 L.R.R.M. 2625, 2626 (1967).

[18] *Id.* at 236, 237, 239, 66 L.R.R.M. at 2625, 2626.

[19] *Id.* at 239, 66 L.R.R.M. at 2626.

[20] *Id.*

[21] *Id.*, 66 L.R.R.M. at 2626–27.

[22] 471 U.S. 724, 757, 758, 119 L.R.R.M. 2569, 2582, 2583 (1985).

chusetts law required that employers provide minimum mental health benefits to employees covered under a health insurance policy.[23] The Court determined that this law did not interfere with the parties' right and ability to bargain collectively or the economic balance of power between the parties.[24] Rather, this law was a minimum term of employment that was independent of the collective bargaining process.[25] The Court asserted that Congress did not intend for the NLRA to replace or disturb state laws that set minimum labor standards unless they were inconsistent with its purposes.[26] The Court held therefore, that the NLRA did not preempt the Massachusetts law.[27]

Also in 1985, in *Allis-Chalmers Corp. v. Lueck*, the Supreme Court held that section 301 of the LMRA required preemption of a state tort claim.[28] The plaintiff in *Lueck* filed a state tort claim alleging a bad-faith handling of an insurance disability claim.[29] The Court reasoned that the state tort claim was "inextricably intertwined" with the terms of the collective bargaining agreement.[30] Resolving the tort claim would rely in large measure on the interpretation of the duties owed under the collective bargaining agreement.[31] In addition, the Court reasoned that the duties and rights alleged in the state tort claim arose through the parties' obligations under the labor contract.[32] Therefore, the Court held that section 301 of the LMRA required preemption of this tort claim because it was "tightly bound" to the interpretation of the labor contract.[33]

The United States Supreme Court reaffirmed its position in 1987, in *Fort Halifax Packing Co. v. Coyne*, holding that the NLRA does not preempt a minimum state labor requirement that does not interfere with equitable collective bargaining.[34] In *Fort Halifax*, a Maine statute required employers to pay a severance benefit to their employees in the event that the plant in which they worked closed.[35] The Court reasoned that the NLRA did not intend to abolish all the minimum

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[23] *Id.* at 730, 119 L.R.R.M. at 2571.
[24] *Id.* at 758, 119 L.R.R.M. at 2583.
[25] *Id.* at 755, 119 L.R.R.M. at 2582.
[26] *Id.* at 756, 119 L.R.R.M. at 2582.
[27] *Metropolitan Life*, 471 U.S. at 758, 119 L.R.R.M. at 2583.
[28] 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352–53 (1985).
[29] *Id.* at 206, 118 L.R.R.M. at 3347.
[30] *Id.* at 213, 218, 118 L.R.R.M. at 3350, 3352.
[31] *Id.* at 218, 118 L.R.R.M. at 3351.
[32] *Id.* at 217, 118 L.R.R.M. at 3351.
[33] *Metropolitan Life*, 471 U.S. at 216, 220, 118 L.R.R.M. at 3351, 3352–53.
[34] 482 U.S. 1, 7, 125 L.R.R.M. 2455, 2457 (1987).
[35] *Id.* at 5, 125 L.R.R.M. at 2457.

protections of state labor law.[36] Rather, the Court stated, Congress understood that employees would come to the bargaining table with guaranteed minimum rights under state law.[37] Therefore, the Court held that the NLRA does not preempt state labor standards unless the state law obstructs the collective bargaining arrangement protected under the Act.[38]

Continuing with its reasoning that Congress intended to maintain minimum state labor standards after the passage of federal labor law, the Supreme Court in the 1988 case of *Lingle v. Norge Division of Magic Chef, Inc.*, held that section 301 of the LMRA did not preempt a state claim of retaliatory discharge.[39] In *Lingle*, a collective bargaining agreement allowed termination only for just cause.[40] The plaintiff, a terminated employee, filed a suit for retaliatory discharge rather than pursue the grievance and arbitration process provided for in the collective bargaining agreement.[41] The Court reasoned that even though the employee had access to arbitration through the collective bargaining agreement, it did not preclude the employee from enforcing her minimum state substantive rights.[42] Because the state law remedy required its own objective standards for resolution, the Court held that federal law did not preempt the employee's "independent" state claim because the state court would not have to interpret the collective bargaining agreement.[43]

These cases demonstrate two important and occasionally conflicting principles of federal labor preemption.[44] First, the Supreme Court has consistently held that state minimum labor standards should exist and apply equally to all employees in the state so long as they do not interfere with the collective bargaining process.[45] Second, the Court has recognized that situations may arise when section 301 of the LMRA

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[36] *See id.* at 21, 125 L.R.R.M. at 2463.

[37] *Id.*

[38] *Id.* at 23, 125 L.R.R.M. at 2464.

[39] 486 U.S. 399, 413, 128 L.R.R.M. 2521, 2526 (1988).

[40] *Id.* at 401, 128 L.R.R.M. at 2522.

[41] *Id.* at 404, 128 L.R.R.M. at 2522.

[42] *Id.* at 411, 128 L.R.R.M. at 2526.

[43] *Id.* at 413, 128 L.R.R.M. at 2526.

[44] *See Lingle*, 486 U.S. at 413, 128 L.R.R.M. at 2526; *Fort Halifax*, 482 U.S. at 7, 125 L.R.R.M. at 2457; *Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53; *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626; *see also* Stephanie R. Marcus, Note, *The Need for a New Approach to Federal Preemption of Union Members' State Law Claims*, 99 YALE L.J. 209, 229 (1989).

[45] *Fort Halifax*, 482 U.S. at 7, 125 L.R.R.M. at 2457; *Metropolitan Life*, 471 U.S. at 754–55, 119 L.R.R.M. at 2581; *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626.

requires preemption of a state claim that derives from a state substantive right.[46]

During the *Survey* year, in *Livadas v. Bradshaw*, the United States Supreme Court reinforced and attempted to clarify its position on these potentially conflicting areas of preemption jurisprudence, holding that federal labor law preempted the California Labor Commissioner's ("the Commissioner") policy of denying enforcement of state wage and penalty laws to individuals protected by a collective bargaining agreement.[47] This decision reinforced the Court's position of ensuring minimum state labor standards as a foundation of the system created by the federal labor statutes.[48] In addition, the Court declared that states cannot rely on section 301 of the LMRA to bypass the application of minimum state labor standards to all employees in the state when the legal character of the state right proves independent of the rights under the collective bargaining agreement.[49]

The plaintiff in *Livadas* worked for the Safeway supermarket chain.[50] A collective bargaining agreement between Safeway and plaintiff's representative, United Food and Commercial Workers, AFL-CIO, governed plaintiff's employment relationship.[51] Safeway terminated the plaintiff on January 2, 1990.[52] Upon termination, plaintiff demanded immediate payment of all compensation due her pursuant to California law.[53] Safeway refused to compensate plaintiff immediately and instead mailed a check which plaintiff received on January 5, 1990.[54]

On January 9, 1990, the plaintiff in *Livadas* filed a claim with the California Division of Labor Standards Enforcement ("the Division") for wages and penalties resulting from the delay in payment.[55] The

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[46] *Lingle*, 486 U.S. at 408 n.7, 128 L.R.R.M. at 2525 n.7; *see Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53.

[47] 114 S. Ct. 2068, 2075, 146 L.R.R.M. 2513, 2517 (1994).

[48] *See Fort Halifax*, 482 U.S. at 23, 125 L.R.R.M. at 2464; *Metropolitan Life*, 471 U.S. at 754–55, 119 L.R.R.M. at 2581; *Nash*, 389 U.S. at 239, 66 L.R.R.M. at 2626.

[49] *Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520.

[50] *Id.* at 2071, 146 L.R.R.M. at 2515.

[51] *Id.*

[52] *Id.*

[53] *Id.* at 2071–72, 146 L.R.R.M. at 2515. CAL. LAB. CODE § 201 (West 1989) provides: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

[54] *Livadas*, 114 S. Ct. at 2072, 146 L.R.R.M. at 2515.

[55] *Id.* CAL. LAB. CODE § 203 (West 1989) provides: "[T]he wages of such employee shall continue as a penalty from the due date thereof at the same rate until paid or until an action therefor is commenced; but such wages shall not continue for more than 30 days." *Id.* at 2072 n.4, 146 L.R.R.M. at 2515 n.4.

Division notified plaintiff that it would not take action on her complaint because the California Labor Code prohibited interpretation or application of a collective bargaining agreement.[56] Based on the policy of its Commissioner, the Division denied enforcement of these provisions of the California Labor Code to individuals covered by collective bargaining agreements that contained arbitration clauses.[57]

The plaintiff in *Livadas* brought an action in the United States District Court for the Northern District of California under 42 U.S.C. § 1983 arguing that federal labor law preempted the Commissioner's policy because it violated her right to bargain collectively.[58] The district court granted summary judgment for plaintiff holding that federal law preempted the Commissioner's policy.[59] The court further reasoned that the NLRA created a right to work under a collective bargaining agreement.[60] The Commissioner's refusal to enforce California's Labor Code on behalf of those employees covered by a collective bargaining agreement infringed on that right.[61] The district court therefore held that federal labor law preempted the policy because the right to immediate payment was a state minimum labor standard and the Commissioner's policy of denying that minimum standard interfered with the balance of economic power in collective bargaining.[62]

The United States Court of Appeals for the Ninth Circuit reversed the district court's decision and held the Commissioner's policy consistent with the dictates of federal preemption policy under section 301 of the LMRA.[63] The Ninth Circuit noted that the Commissioner's policy was premised on the condition that California law could not apply or interpret a collective bargaining agreement.[64] The court de-

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[56] *Livadas*, 114 S. Ct. at 2072, 146 L.R.R.M. at 2515. The letter stated:

> The provisions of Labor Code Section 229 preclude this Division from adjudicating any dispute concerning the interpretation or application of any collective bargaining agreement containing an arbitration clause.
>
> Labor Code Section 203 requires that the wages continue at the "same rate" until paid. In order to establish what the "same rate" was, it is necessary to look to the collective bargaining agreement and 'apply' that agreement.

Id., 146 L.R.R.M. at 2515–16.

[57] *Id.* at 2073, 146 L.R.R.M. at 2516.

[58] Livadas v. Aubry, 749 F. Supp. 1526, 1528, 135 L.R.R.M. 2954, 2955 (N.D. Cal. 1990), *rev'd*, 987 F.2d 552 (9th Cir. 1991), *rev'd sub nom.* Livadas v. Bradshaw, 114 S. Ct. 2068, 146 L.R.R.M. 2513 (1994).

[59] *Id.* at 1540, 135 L.R.R.M. at 2965.

[60] *Id.* at 1533, 135 L.R.R.M. at 2960.

[61] *Id.* at 1534, 135 L.R.R.M. at 2961.

[62] *Id.* at 1540, 135 L.R.R.M. at 2965.

[63] Livadas v. Aubry, 987 F.2d 552, 558, 560 (9th Cir. 1991), *rev'd sub nom.* Livadas v. Bradshaw, 114 S. Ct. 2069, 146 L.R.R.M. 2513 (1994).

[64] *Id.* at 558.

termined that plaintiff's claim was actually a claim against the Division for erroneously applying its policy to plaintiff because the Division did not need to interpret the collective bargaining agreement to enforce this provision of the California Labor Code.[65] The Ninth Circuit reasoned that plaintiff's claim was therefore a state action, and that plaintiff should have sought a writ compelling the Commissioner to change the eligibility determination of her ability to enforce the Labor Code.[66] The Ninth Circuit reversed the district court because it saw no deprivation of plaintiff's right to bargain collectively.[67]

The United States Supreme Court reversed the Ninth Circuit and held that federal labor law preempted the California Labor Commissioner's policy.[68] The Court reasoned that, under the *Nash* rationale, federal law and policy preempt a state rule that interferes with a protected right, here the right to bargain collectively.[69] The Court further reasoned that the Commissioner's policy left the plaintiff with an "unappetizing choice."[70] The plaintiff had to choose either to enforce her minimum state labor rights under the California Labor Code or enter a collective bargaining agreement.[71] This, the Court held, subverted the congressional intent behind the enactment of the NLRA and, therefore, the NLRA must preempt the Commissioner's policy under the Supremacy Clause of the Federal Constitution because the policy created an obstacle to the purposes and objectives of federal law.[72]

The Court rejected the Commissioner's argument that federal law required the policy of denying enforcement to employees covered by collective bargaining agreements.[73] The Commissioner argued that section 301 of the LMRA precludes states from interpreting collective bargaining agreements and therefore the policy did not contravene federal preemption jurisprudence.[74] The Court noted that section 301 preemption jurisprudence assures that a state's interpretation of collective bargaining agreements will not frustrate the purposes of federal labor law.[75] The Court continued, however, by stating that preemption jurisprudence clearly establishes that states may not read section 301

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[65] *Id.* at 559.
[66] *Id.*
[67] *Id.* at 560.
[68] Livadas v. Bradshaw, 114 S. Ct. 2068, 2074, 146 L.R.R.M. 2513, 2517 (1994).
[69] *Id.*
[70] *Id.* at 2075, 146 L.R.R.M. at 2517.
[71] *Id.*
[72] *Id.* at 2074, 2076, 146 L.R.R.M. at 2517, 2518.
[73] *Livadas*, 114 S. Ct. at 2077, 2078, 146 L.R.R.M. at 2519, 2520.
[74] *Id.* at 2077, 146 L.R.R.M. at 2519.
[75] *Id.* at 2078, 146 L.R.R.M. at 2519.

so broadly as to require preemption of "non-negotiable" rights that do not require application or interpretation of a collective bargaining agreement in their resolution.[76] In addition, the Court concluded that in this dispute, the Commissioner did not need to interpret the collective bargaining agreement.[77] As such, federal law did not compel the Commissioner's action.[78]

The Court also rejected the Commissioner's argument that the policy reflected a "conscious decision" of encouraging parties to include their own terms in collective bargaining agreements.[79] The Court noted that requiring employees to bargain for what they are otherwise entitled to does not further labor law policies.[80] Indeed, the Court stated, Congress intended to guarantee certain minimum protections offered to workers by their state as a backdrop to federal labor law.[81] For that reason, the Court rejected the notion that employees should have to bargain for minimum state rights.[82]

Upon concluding that federal labor law preempted the Commissioner's policy and rejecting the Commissioner's arguments in support of her policy, the Court concluded that the employee properly sought relief under 42 U.S.C. § 1983.[83] The Court determined that the right to bargain collectively is fundamental to the NLRA.[84] Therefore, a deprivation of that right gives rise to a cause of action under section 1983.[85] The Court concluded that plaintiff had a valid cause of action for the deprivation of her federally protected right.[86]

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[76] *Id.*, 146 L.R.R.M. at 2520.

[77] *Id.* at 2079, 146 L.R.R.M. at 2520. The Court stated that there was no dispute in this case over the amount of the penalty and therefore, consistent with *Lingle*, the "mere need to 'look to' the collective bargaining agreement for damage computation is no reason to hold the state law claim defeated by § 301." *Id.*

[78] *Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520.

[79] *Id.* at 2079, 2080, 2081, 146 L.R.R.M. at 2521, 2522.

[80] *Id.* at 2081, 146 L.R.R.M. at 2522.

[81] *Id.*

[82] *Id.*

[83] *Livadas*, 114 S. Ct. at 2082–83, 146 L.R.R.M. at 2523. Section 1993 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1988).

[84] *Livadas*, 114 S. Ct. at 2083, 146 L.R.R.M. at 2524.

[85] *Id.*

[86] *Id.* at 2084, 146 L.R.R.M. at 2524.

The *Livadas* Court reaffirmed the importance of ensuring that state minimum labor standards apply equally to all employees in the state.[87] The Court made clear that state rules that encourage refraining from conduct protected by federal law directly interfere with congressional objectives.[88] In addition, the *Livadas* opinion makes it clear that states may not arbitrarily rely on section 301 of the LMRA as a means of bypassing the requirement that state minimum labor standards apply to all employees in the state.[89]

The standard the Supreme Court used in determining that section 301 did not require preemption of the state right in *Livadas* moved away from the Court's previous focus on strict contract interpretation.[90] The Court instead stated that the legal character of the state right or claim must be "independent" of the rights under the collective bargaining agreement if it is to survive section 301 preemption.[91] This standard shifts the focus from the state's need to interpret a collective bargaining agreement as the central issue of section 301, to the source of the claimed rights and duties asserted in the state claim.[92] Under this standard, if the rights and duties asserted in the state claim arise out of the contractual obligation of the collective bargaining agreement, section 301 preempts the state claim.[93]

The balance between minimum state rights and section 301 principles remains unclear under this vague standard. State minimum labor standards will presumably prevail unless their "legal character" depends on a collective bargaining agreement.[94] In *Livadas*, the collective bargaining agreement created the right to payment of salary, but the state legislature established the "independent" rights to a penalty and to payment immediately upon termination.[95] This made it "clear beyond preadventure" to the Court that section 301 did not require preemption of this minimum state right.[96] The Court noted, however,

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[87] *See id.* at 2074–75, 146 L.R.R.M. at 2517.

[88] *Id.* at 2074, 146 L.R.R.M. at 2517.

[89] 114 S. Ct. at 2078, 146 L.R.R.M. at 2520.

[90] *See id.* Previously, in *Lueck* and *Lingle*, the Supreme Court centered its analysis around the idea that states could not interpret collective bargaining agreements. Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 413, 128 L.R.R.M. 2521, 2527 (1988); Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 220, 118 L.R.R.M. 3345, 3352–53 (1985).

[91] *Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520.

[92] *See id.*; *Lingle*, 486 U.S. at 413, 128 L.R.R.M. at 2527; *Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53.

[93] *See Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520; *Lueck*, 471 U.S. at 217, 118 L.R.R.M. at 3351.

[94] *See Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520.

[95] *Id.* at 2079, 146 L.R.R.M. at 2520.

[96] *Id.* at 2078 n.18, 146 L.R.R.M. at 2520 n.18. The Supreme Court stated that § 301 has not

that section 301 may preempt application of this provision in other factual circumstances.[97] Rather than create a workable standard for states and lower courts to use in determining whether section 301 preempts a minimum state right, however, the Court created the need for *ad hoc* judicial determinations of the "independence" of the state right.[98]

Examination of *Lingle* and *Lueck* provides slight insight into the direction of the Court's analysis with respect to determining whether the legal character of a state claim or right is "independent" from a collective bargaining agreement.[99] In *Lueck*, the Court focused on the need to interpret the labor contract as the test of section 301 preemption.[100] The *Lingle* Court focused on the independence of the claim and defined "independence" by the need for the state to interpret the labor contract.[101] The Supreme Court in *Livadas* adopted the *Lingle* focus on the "independence" of the claim, and the dicta in *Lueck* regarding the sources of the duties and obligations of the state right in the standard for determining section 301 preemption.[102] In addition, the Supreme Court clarified that the strict contract interpretation model is not the appropriate test by recognizing that states may "look" at collective bargaining agreements in resolving these disputes without triggering section 301 preemption.[103]

Even though *Lingle* and *Lueck* provide general guidance as to the Court's principal concerns in this area, the potential still remains for

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become a "sufficiently 'mighty oak'" to require preemption in this case. *Id.* at 2077, 146 L.R.R.M. at 2519.

[97] *See id.* at 2079 n.19, 146 L.R.R.M. at 2520 n.19.

[98] *See id.* at 2078, 146 L.R.R.M. at 2520.

[99] *See Lingle*, 486 U.S. at 413, 128 L.R.R.M. at 2526; *Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53. The Court in *Livadas* recognized that the application of the *Lueck* and *Lingle* decisions has lacked uniformity in lower courts. *Livadas*, 114 S. Ct. at 2078 n.18, 121 L.R.R.M. at 2520 n.18. The Court did not feel compelled however, to clarify the standard of those decisions in this case. *Id.*

[100] 471 U.S. at 220, 118 L.R.R.M. at 3352–53. The *Lueck* Court also discussed the origins of the duties and obligations under the state claim as a potential factor in § 301 preemption. *Id.* at 217, 118 L.R.R.M. at 3351.

[101] 486 U.S. at 410, 413, 128 L.R.R.M. at 2525, 2526.

[102] *See Livadas*, 114 S. Ct. at 2078, 146 L.R.R.M. at 2520; *Lingle*, 486 U.S. at 410, 128 L.R.R.M. at 2525; *Lueck*, 471 U.S. at 217, 118 L.R.R.M. at 3351.

[103] *Livadas*, 114 S. Ct. at 2079, 146 L.R.R.M. at 2520. These ideas were first expressed in *Lingle* where the Court stated:

> A collective-bargaining agreement may, of course, contain information such as rate of pay and other economic benefits that might be helpful in determining the damages to which a worker prevailing in a state-law suit is entitled . . . . Although federal law would govern the interpretation of the agreement to determine the proper damages, the underlying state-law claim, not otherwise pre-empted, would stand.

486 U.S. at 413 n.12, 128 L.R.R.M. at 2526 n.12.

continued inconsistent interpretation.[104] The Supreme Court has moved away from a strict contract interpretation test in section 301 analysis to the independent legal character test.[105] Lower courts need a clearer standard for consistent results in the application of the independent legal character test. As evidenced in *Livadas*, the Court is attempting to shift the focus to the legal character test while continuing to recognize the importance of avoiding contract interpretation by states.[106] A clear, two step analysis would aid states and lower courts in balancing section 301 against minimum state rights. The first step would require a determination of whether the state right or a portion of that right relies on an obligation or duty created by a collective bargaining agreement.[107] The second step would require an examination of whether the portion of the collective bargaining agreement relied on in the state right is central to the state right or merely collateral (i.e., used for the calculation of damages).[108] This two prong inquiry, consistent with the Court's reasoning, would clarify section 301 preemption of state rights for states and lower courts.

In summary, *Livadas* reinforced the Court's position that state minimum labor standards need to coexist with federal labor law and that states cannot discriminate in their application.[109] The Court also declared that states cannot use section 301 preemption as a means of circumventing this requirement.[110] The Court failed, however, to provide a workable standard on which states can rely in determining where to draw the line between minimum state substantive rights and the preclusion of state interpretation of collective bargaining agreements.

B. **The Railway Labor Act Does Not Preempt Aggrieved Workers from Litigating a Claim Based on State Law:* Hawaiian Airlines, Inc. v. Norris[1]

Congress enacted the Railway Labor Act ("RLA") in 1926 to prevent strikes in vital transportation industries by providing a compre-

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[104] *See Livadas*, 114 S. Ct. at 2078 n.18, 146 L.R.R.M. at 2520 n.18.

[105] *See id.* at 2078, 2079, 146 L.R.R.M. at 2520; *Lingle*, 486 U.S. at 413, 128 L.R.R.M. at 2526; *Lueck*, 471 U.S. at 220, 118 L.R.R.M. at 3352–53.

[106] 114 S. Ct. at 2078, 2079, 146 L.R.R.M. at 2520. Even though the Court focuses on the independence of the legal character of the right, the opinion still discusses that the "mere" need to look to the agreement is not sufficient for preemption. *Id.* at 2079, 146 L.R.R.M. at 2520.

[107] *See Lueck*, 471 U.S. at 217, 118 L.R.R.M. at 3351.

[108] *See Livadas*, 114 S. Ct. at 2079, 146 L.R.R.M. at 2520; *Lingle*, 486 U.S. at 413 n.12, 128 L.R.R.M. at 2526 n.12.

[109] *See* 114 S. Ct. at 2074–75, 146 L.R.R.M. at 2517.

[110] *See id.* at 2077, 146 L.R.R.M. at 2519.

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[1] 114 S. Ct. 2239, 146 L.R.R.M. 2577 (1994).

hensive framework for resolving labor disputes.[2] To achieve this goal, the RLA mandates that parties resolve "minor disputes," worker grievances that can be resolved conclusively by interpreting terms in an existing Collective Bargaining Agreement ("CBA"), through an administrative rather than judicial process.[3] Specifically, the RLA requires that aggrieved workers follow the dispute resolution system outlined in their CBAs.[4] Upon failure to reach a satisfactory settlement, either party may appeal to an outside Adjustment Board as a forum of last resort.[5] Not surprisingly, litigants who would prefer litigation to an adjustment board have asked the courts to define exactly when the RLA preempts court action.[6]

Initially, the United States Supreme Court did not interpret the RLA as preempting aggrieved workers from turning to the courts.[7] In a 1941 case, *Moore v. Illinois Central R.R.*, the Court held that an employee could file a wrongful discharge claim in state court in place of appealing his case to the Adjustment Board.[8] Moore claimed wrongful discharge in violation of the CBA then in force with his employer.[9]

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[2] 45 U.S.C. §§ 151–188 (1988). Congress expanded the RLA to cover the airline industry in 1936. 45 U.S.C. § 184. The overarching purpose of the Railway Labor Act is "to avoid any interruption to commerce or to the operation of any carrier engaged therein." 45 U.S.C. § 151(a)(1); Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 562, 124 L.R.R.M. 2953, 2955 (1987) (RLA provides comprehensive framework for resolution of labor disputes in transportation industry).

[3] 45 U.S.C. § 153. The Court adopted the terms "major disputes" and "minor disputes" from traditional railway labor nomenclature to describe the two types of work force actions covered by the RLA. Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723–24, 16 L.R.R.M. 749, 754–55 (1945). The terms do not actually appear in the text of the statute. 45 U.S.C. §§ 151–188. Minor disputes "grow[] out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. § 151(a)(5); Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 305, 131 L.R.R.M. 2601, 2603 (1990) (distinguishing feature of minor dispute is that grievance may be conclusively resolved by interpreting existing CBA).

[4] Minor dispute "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes." 45 U.S.C. § 153(i).

[5] The RLA establishes a 34-member National Railway Adjustment Board to adjudicate minor disputes, with 17 members selected by the carriers and 17 by the unions. 45 U.S.C. § 153(a). Section 184 compels each airline and its employees to establish an adjustment board pursuant to the guidelines set forth in § 153. 45 U.S.C. § 184. Parties who fail to reach agreement using internal arbitration procedures may refer the unresolved grievance "by petition of the parties or by either party to the appropriate division of the Adjustment Board." 45 U.S.C. § 153(i). Board decisions are "final and binding." 45 U.S.C. § 153(m).

[6] *E.g.*, Hawaiian Airlines, Inc., v. Norris, 114 S. Ct. 2239, 2241, 146 L.R.R.M. 2577, 2578 (1994) (does RLA preempt suit filed pursuant to state whistle blowers protection statute); *Buell*, 480 U.S. at 559, 124 L.R.R.M. at 2953 (does RLA preempt suit filed pursuant to Federal Employee Labor Act); Andrews v. Louisville & N. R.R., 406 U.S. 320, 321, 80 L.R.R.M. 2240 (1972) (does RLA preempt wrongful discharge suit brought in state court).

[7] Moore v. Illinois Cent. R.R., 312 U.S. 630, 634, 8 L.R.R.M. 455, 456 (1941).

[8] *Id.*

[9] *Id.* at 632, 8 L.R.R.M. at 455.

The Court interpreted RLA § 153(i), which provides that disputes "*may* be referred to the Adjustment Board," as reducing administrative review to just one option Moore could pursue.[10] If Congress had intended the RLA to preclude judicial remedies, the Court reasoned, Congress would have chosen obviously preclusive wording rather than the word "may."[11] Accordingly, the Court held that Moore could pursue his wrongful discharge claim in the courts.[12]

The Court overruled *Moore* in 1972 with its decision in *Andrews v. Louisville & Nashville R.R.*[13] The Court held holding that an aggrieved worker could pursue a claim of wrongful discharge in violation of an existing CBA only under RLA administrative procedures.[14] As in *Moore*, the plaintiff claimed wrongful discharge in violation of his rights under the CBA and brought suit in state court.[15] Rather than simply relying on a statutory construction analysis, however, the *Andrews* Court consulted the Congressional Record to divine the lawmakers' intent.[16] The Court observed that during congressional debate both proponents and opponents of the bill understood administrative review to be an aggrieved worker's only remedy.[17] Accordingly, the Court held that the plaintiff had no recourse to state court.[18]

In 1987, however, in *Atchison, Topeka & Santa Fe Ry. v. Buell*, the Supreme Court carved out an exception to the potentially broad preemption envisioned by *Andrews*.[19] The *Buell* Court held that an injured worker could sue for damages under the Federal Employees Liability Act ("FELA"), even though he could also have pursued the claim under an existing CBA.[20] Buell had filed a FELA claim in United States District Court for the Eastern District of California, claiming that his

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[10] *Id.* at 635, 8 L.R.R.M. at 457 (citing 45 U.S.C. § 153(i)) (emphasis added).

[11] *Id.* The Court also noted that Congress replaced the word "shall" with "may" when amending § 153 in 1934. *Id.*

[12] *Moore*, 312 U.S. at 634, 8 L.R.R.M. at 456.

[13] 406 U.S. 320, 324, 326, 80 L.R.R.M. 2240, 2241, 2242 (1972).

[14] *Id.*

[15] *Id.* at 320–21, 80 L.R.R.M. at 2240.

[16] *Id.* at 322, 80 L.R.R.M. at 2240 (citing Brotherhood of R.R. Trainmen v. Chicago, R. & I. R.R., 353 U.S. 30, 39, 39 L.R.R.M. 2578, 2581 (1957)). The Court in *Brotherhood of R.R. Trainmen* analyzed in detail the Congressional Record for 1932 amendments to the RLA. 353 U.S. at 39, 39 L.R.R.M. at 2581 (citing *Hearings on J.R. 7650 Before House Comm. on Interstate and Foreign Commerce*, 73d. Cong., 2d Sess. 47 (1932)).

[17] *Andrews*, 406 U.S. at 322, 80 L.R.R.M. at 2240 (citing *Brotherhood of R.R. Trainmen*, 353 U.S. at 29, 39 L.R.R.M. at 2581).

[18] *Id.* at 325, 80 L.R.R.M. 2242.

[19] 480 U.S. 557, 564, 124 L.R.R.M. 2953, 2955–56 (1987).

[20] *Id.* at 564, 124 L.R.R.M. at 2955–56; *see* 45 U.S.C. §§ 51–60 (1988). FELA provides in pertinent part that "[e]very common carrier by railroad . . . shall be liable in damages to any person suffering injury while he is employed by such carrier." 45 U.S.C. § 51.

employer had condoned harassment by fellow employees that caused him to suffer an emotional breakdown.[21] The Court found it inconceivable that Congress had intended the RLA to prevent injured workers from pursuing rights of redress it had expressly created under FELA.[22] Accordingly, the Court held that Buell could pursue his FELA claim in federal court, even though he could also press his grievance following RLA guidelines.[23]

Moreover, in *Lingle v. Norge Division of Magic Chef, Inc.*, decided in 1988, the Supreme Court held that an aggrieved employee could sue for damages under state law when the claim did not require interpreting a CBA.[24] In *Lingle*, the Court defined the preemptive scope envisioned by section 301 of the Labor Management Relations Act ("LMRA"), which states that an aggrieved worker alleging breach of a CBA must pursue her claim according to federal law.[25] Lingle had filed a state law retaliatory discharge action, claiming she had been terminated for pursuing her rights under Illinois' workers compensation laws.[26] The Court concluded, however, that Lingle's wrongful discharge claim was independent of her CBA, because it required factual analysis of her employer's motives when firing her.[27] Accordingly, the Court held that Lingle could pursue a retaliatory discharge claim based on state law.[28]

In 1989, in *Consolidated Rail v. Railway Labor Executives Ass'n*, the Court articulated a test for identifying minor disputes.[29] In *Consolidated Rail*, the Court defined a minor dispute as one conclusively resolvable through interpreting an existing CBA.[30] Unions representing employ-

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[21] *Buell*, 480 U.S. at 559, 124 L.R.R.M. at 2953–54.

[22] *Id.* at 565, 124 L.R.R.M. at 2956.

[23] *Id.* at 564, 124 L.R.R.M. at 2955–56.

[24] 486 U.S. 399, 409–10, 128 L.R.R.M. 2521, 2525 (1988).

[25] *Id.* at 404, 128 L.R.R.M. at 2532; *see* Labor Management Relations Act § 301, 29 U.S.C. §§ 185–188 (1988). 29 U.S.C. § 185(a) provides in pertinent part "suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." The Court had previously interpreted § 185(a) as compelling employees to pursue claims under to federal rather than state law to fulfill Congress's intent to achieve uniform interpretation of existing CBAs. Teamsters v. Lucas Flour Co., 369 U.S. 95, 103–04 (1962).

[26] *Lingle*, 486 U.S. at 402, 128 L.R.R.M. at 2522.

[27] *Id.* at 407, 128 L.R.R.M. 2524.

[28] *Id.* at 409–10, 128 L.R.R.M. at 2525.

[29] 491 U.S. 299, 305, 131 L.R.R.M. 2601, 2603 (1990).

[30] *Id.* In *Consolidated Rail*, the Court refined the definition of a minor grievance it had previously promulgated in Elgin, J. & E. Ry. v. Burley, 325 U.S. 711, 723, 16 L.R.R.M. 749, 754–55 (1945). In *Burley*, the Court characterized minor grievances as disputes "contemplat[ing] the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one." *Id.*

ees of Consolidated Rail Corporation ("Conrail") sought an injunction to prevent Conrail from imposing mandatory drug testing without first negotiating with the unions.[31] Conrail argued that the unions were pressing a minor dispute and therefore could not ask the courts for assistance.[32] In examining the existing CBA, the Court found it contained implied terms that arguably could permit the testing.[33] Thus, the Court held the union's grievance to be minor because it could be resolved by interpreting an existing CBA.[34]

Following *Andrews* and its progeny, aggrieved railroad and airline workers wishing to bring suit over minor disputes stood precluded from the courts, provided their CBAs contained express or implied terms relating to their causes of action.[35] Only one exception to broad RLA preemption prevailed: when a federal law provided independent grounds upon which the aggrieved worker could litigate his claim.[36] Although the Court in *Lingle* permitted aggrieved workers to escape preemption when a state as well as federal law provided independent grounds, this decision interpreted only the LMRA, not the RLA.[37]

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[31] Railway Labor Executives Ass'n v. Consolidated Rail Corp., 845 F.2d 1187, 1189, 128 L.R.R.M. 2168, 2169 (3d Cir. 1988), *rev'd*, 491 U.S. 299 (1989).

[32] *Consolidated Rail*, 491 U.S. at 301, 131 L.R.R.M. at 2602.

[33] *Id.* at 320, 131 L.R.R.M. at 2609. Implied terms are not actually written in the CBA, but are practices and customs that exist in the employment relationship nonetheless. *Id.* at 311, 131 L.R.R.M. at 2606. Collective bargaining agreements may contain implied as well as express terms. *Id.*

[34] *Id.*

[35] *Id.* at 305, 311, 131 L.R.R.M. at 2603, 2606; Andrews v. Louisville & N. R.R., 406 U.S. 557, 325, 80 L.R.R.M. 2240, 2242 (1972).

[36] Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 564, 124 L.R.R.M. 2953, 2956 (1987). The circuits split, however, over how broadly to interpret *Buell*. The Second Circuit held that an employment discrimination claim brought under the Rehabilitation Act of 1973 was not subject to RLA preemption. Bates v. Long Island R.R., 997 F.2d 1028, 1034, 143 L.R.R.M. 2767, 2771 (2d Cir.), *cert. denied*, 114 S. Ct. 550 (1993). Echoing *Buell*'s reasoning, the Second Circuit concluded that an employee should not be constrained to arbitration in civil rights cases unless Congress so specified. *Id.* The Fifth Circuit, however, expressly criticized the Second Circuit when holding that the RLA preempted an aggrieved worker from filing a Title VII employment discrimination claim. Hirras v. National R.R. Passenger Corp., 10 F.3d 1142, 1148, 145 L.R.R.M. 2137, 2141 (5th Cir. 1993), *judgement vacated by* 114 S. Ct. 2732, 146 L.R.R.M. 2704 (1994). The court noted that Congress in Title VII, unlike in FELA, encouraged aggrieved parties to settle discrimination disputes through arbitration. *Id.*

[37] Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 401, 128 L.R.R.M. 2521, 2522 (1988). In the six years after the *Lingle* decision, federal courts declined on several occasions to apply to RLA cases the relaxed preemption standard applied to § 301 of the LMRA. *E.g.*, *Hirras*, 10 F.3d at 1149, 145 L.R.R.M. at 2142 (state law claim for emotional distress preempted by RLA); Grote v. Trans World Airlines, 905 F.2d 1307, 1311, 134 L.R.R.M. 2583, 2586 (9th Cir. 1990) (state law claims of breach of covenant of good faith, intentional infliction of emotional distress, and defamation preempted by RLA); Espinoza v. Norfolk & W. Ry., 750 F. Supp. 819, 827, 57 Empl. Prac. Dec. (CCH) P41,170, 69,262 (E.D. Mich. 1990) (state law claim of wrongful termination based on handicap preempted by RLA).

During the *Survey* year, however, the United States Supreme Court in *Hawaiian Airlines, Inc. v. Norris* held that an aggrieved railroad or airline employee could turn to the courts as when the worker's grievance rested on state law grounds independent of an existing CBA.[38] In *Hawaiian Airlines*, an aircraft mechanic was terminated for insubordination for refusing to sign a maintenance log and subsequently alerting the Federal Aviation Administration ("FAA") of alleged unsafe repairs.[39] The mechanic filed a retaliatory discharge claim in state court, claiming he had been fired for "whistle blowing" in violation of Hawaii's Whistlerblowers' Protection Act.[40] The Court adopted its reasoning in *Buell* and *Lingle* to conclude that Congress never intended the RLA to deny a litigant the protections other labor laws provided when the worker's cause of action existed independent of a CBA.[41] Therefore, the Court held that Norris could litigate a retaliatory discharge claim based on state law.[42]

Hawaiian Airlines hired Grant Norris as aircraft mechanic on February 2, 1987.[43] A CBA between the airline and the International Association of Aerospace Workers included provisions prohibiting discharge without just cause and discipline for refusal to perform work in violation of health or safety laws.[44] The dispute in question arose six months later, when Norris discovered a scarred and grooved axle sleeve on one of the airline's DC-9 passenger aircraft.[45] Norris recommended replacement of the sleeve, but his supervisor instead ordered it sanded smooth and returned to the plane.[46] Norris subsequently refused to sign a maintenance record certifying the plane was safe to fly, and his supervisor immediately suspended him for insubordination, pending a termination hearing.[47] Norris returned home and telephoned the FAA to report the problem with the sleeve.[48]

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[38] *Hawaiian Airlines*, 114 S. Ct. at 2251, 146 L.R.R.M. at 2586.

[39] *Id.* at 2242, 146 L.R.R.M. 2579.

[40] *Id.* The Hawaii Whistleblowers' Protection Act, § 378-61 provides in pertinent part "an employer shall not discharge . . . an employee because [he] reports . . . to a public body . . . a violation or a suspected violation of a law or rule adopted pursuant to the law of this State . . . or the United States." HAW. REV. STAT. § 378-62 (1994).

[41] *Hawaiian Airlines*, 114 S. Ct. at 2249, 146 L.R.R.M. at 2584.

[42] *Id.* at 2251, 146 L.R.R.M. at 2586.

[43] *Hawaiian Airlines*, 114 S. Ct. at 2242, 146 L.R.R.M. at 2579.

[44] *Id.*

[45] *Id.* A DC-9 axle sleeve in safe operating condition should have a mirror-smooth surface to permit the aircraft wheels to rotate freely. *Id.*; telephone interview with Ronald Kuphal, Aircraft Mechanic, Bradley Int'l Airport (Oct. 1994).

[46] *Hawaiian Airlines*, 114 S. Ct. at 2242, 146 L.R.R.M. at 2579.

[47] *Id.*

[48] *Id.* at 2242, 146 L.R.R.M. at 2579.

Norris instituted grievance procedures pursuant to his CBA and was terminated for insubordination following a hearing on July 31, 1987.[49] Rather than appealing the hearing result through the CBA's grievance procedures, Norris filed a wrongful discharge suit in state court alleging that (1) he had been discharged in violation of Hawaii's Whistleblowers' Protection Act, (2) he had been discharged in violation of public policy expressed in the Federal Aviation Act, and (3) Hawaiian Airlines breached the CBA provision prohibiting discharge except for just cause.[50]

Hawaiian Airlines removed to the United States District Court for the District of Hawaii, which dismissed Norris' breach of contract claim as preempted by the RLA and remanded his other two claims back to state trial court.[51] The state court dismissed Norris' other two claims, reasoning that the RLA preempted them as well.[52] Norris appealed the adverse ruling to the Hawaii Supreme Court.[53]

In *Norris v. Hawaiian Airlines, Inc.*, the Hawaii Supreme Court reversed, holding that Congress intended RLA preemption to apply only to disputes that the parties could resolve conclusively by interpreting a CBA.[54] The court based its decision on the *Consolidated Rail* definition restricting minor disputes subject to RLA preemption to grievances that involved interpretation of an existing CBA.[55] The Hawaii court then cited *Lingle* for the proposition that a retaliatory discharge claim rests on the employer's motive, not on any terms in a CBA.[56] Thus, the Hawaii Supreme Court ruled that Norris could allege retaliatory discharge in state court.[57]

In affirming the Hawaii Supreme Court decision, the United States Supreme Court probed congressional intent by examining the exact statutory language used.[58] Specifically, the Court considered the first "or" in the phrase describing minor disputes as "growing out of grievances *or* out of the interpretation or application of [CBAs]."[59] Hawaiian

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[49] *Id.*

[50] *Hawaiian Airlines*, 114 S. Ct. at 2242–43, 146 L.R.R.M. at 2579; *see* Whistleblowers' Protection Act, HAW. REV. STAT. §§ 378-61 to 378-69.

[51] *Hawaiian Airlines*, 114 S. Ct. at 2243, 146 L.R.R.M. at 2579.

[52] *Id.*

[53] *Id.*

[54] 842 P.2d 634, 645, 142 L.R.R.M. 2201, 2207–08 (Haw. 1992).

[55] *Id.* at 641–42, 142 L.R.R.M. at 2205; see Consolidated Rail Corp. v. Railway Labor Executives Ass'n, 491 U.S. 299, 305, 131 L.R.R.M. 2601, 2603 (1990).

[56] *Norris*, 842 P.2d at 642–43, 142 L.R.R.M. at 2206; *see* Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 407, 128 L.R.R.M. 2521, 2524 (1988).

[57] *Norris*, 842 P.2d at 645, 142 L.R.R.M. at 2207–08.

[58] *Hawaiian Airlines*, 114 S. Ct. at 2244, 146 L.R.R.M. at 2580.

[59] *Id.* (citing 45 U.S.C. § 151(a)).

Airlines argued that the first "or" indicated Congress had two broad categories of disputes it intended to preempt: "grievances," which include all types of employment-related disputes, and disputes requiring interpretation of CBA employment terms.[60] Otherwise, they argued, use of the word "grievance" in the statute is merely superfluous.[61]

The Court disagreed, noting that such a broad definition of grievance would render the rest of the sentence superfluous; disputes grounded in the interpretation of existing CBAs would already have been addressed as grievances.[62] The Court instead interpreted grievances as synonymous for disputes grounded in the interpretation of an existing CBA, pointing out that "or" can be used in statutory construction to indicate that two phrases serve merely as substitutes for one another.[63] The Court further bolstered its reasoning by citing National Railroad Adjustment Board ("NRAB") opinions indicating that the NRAB understood its jurisdiction as limited to cases involving the interpretation of an existing CBA.[64]

The Court also examined prior decisions to confirm that the RLA preempted only minor disputes that involved interpretation of an existing CBA.[65] The Court began by distinguishing *Andrews*, reasoning that Congress intended the strict preemption standard to apply only when a litigant's case rested solely on interpreting an existing CBA.[66] The plaintiff in *Andrews* alleged only a breach of the wrongful discharge clause contained in his CBA.[67]

Subsequently, the Court pointed to *Buell* as precedent for an aggrieved worker's right to file a lawsuit when grounded on a claim independent of a CBA.[68] In *Buell*, however, the Court established only that federal law could provide such an independent cause of action.[69] As precedent that state law could provide independent grounds as well, the Court turned to its holding in *Lingle*.[70] By analogy, the Court applied the *Lingle* decision, originally applicable only to workers subject to LMRA preemption, to workers subject to RLA preemption as well.[71]

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[60] *Id.*

[61] *Id.*

[62] *Id.*

[63] *Hawaiian Airlines*, 114 S. Ct. at 2245, 146 L.R.R.M. at 2581.

[64] *Id.* at 2244, 146 L.R.R.M. at 2580 (citing cases).

[65] *Id.* at 2245–49, 146 L.R.R.M. at 2581–84 (citing cases).

[66] *Id.* at 2246, 146 L.R.R.M. at 2582.

[67] *Id.*

[68] *Hawaiian Airlines*, 114 S. Ct. at 2247, 146 L.R.R.M. at 2583.

[69] Atchison, T. & S.F. Ry. v. Buell, 480 U.S. 557, 564, 124 L.R.R.M. 2953, 2956 (1987).

[70] *Hawaiian Airlines*, 114 S. Ct. at 2249, 146 L.R.R.M. at 2584.

[71] *See id.*

Finally, the Court rejected Hawaiian Airlines' argument that permitting Norris' state law claim would run counter to *Consolidated Rail*, in which the Court defined a minor dispute as one resolvable by interpreting existing CBA terms.[72] Hawaiian Airlines pointed out that Norris' CBA contained terms that permitted termination for just cause.[73] The Court discounted *Consolidated Rail*, however, as merely defining what constitutes a minor dispute, not when the RLA would preempt it.[74] The Court further noted that if an aggrieved worker had a state law claim existing *independent* of the CBA, it by definition could not be resolved merely by interpreting CBA terms.[75] Accordingly, the Court held that an aggrieved employee could file a claim when the worker's grievance rested on state law grounds independent of an existing CBA.[76]

The Court in *Hawaiian Airlines* made it clear that airline and railroad workers can turn to the courts when they have a cause of action based on a state or federal law enacted to preserve workers' rights. Because such a claim cannot be resolved conclusively by interpreting an existing CBA, the RLA will not preempt it based on the *Consolidated Rail* definition of a minor dispute. In contrast, synthesizing *Hawaiian Airlines* and *Consolidated Rail* yields a working definition of when the RLA *will* preempt a minor dispute: railroad and airline workers may not litigate a dispute with their employer when interpreting express or implied terms in an existing CBA conclusively resolves the grievance and no independent cause of action exists under federal or state law. Previous lower court decisions adopting a broader definition of RLA preemption no longer can be considered good law.[77]

In *Hawaiian Airlines*, *Buell* and *Lingle*, the Court has established a clear pecking order between conflicting policy goals. congressional and state goals of protecting workers' rights trump Congress's goal of ensuring expediently decided labor disputes. Because the Court was fully aware of Congress's intent in passing the RLA, one can conclude that the Justices reached a conscious decision.[78]

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[72] *Id.* at 2249–50, 146 L.R.R.M. at 2584–85.

[73] *Id.* at 2250, 146 L.R.R.M. at 2585.

[74] *Id.*

[75] *Hawaiian Airlines*, 114 S. Ct. at 2250, 146 L.R.R.M. at 2585.

[76] *Id.* at 2249, 146 L.R.R.M. at 2584.

[77] *See* Hirras v. National R.R. Passenger Corp., 114 S. Ct. 2732, 146 L.R.R.M. 2704 (1994). In light of the *Hawaiian Airlines* decision, the Court vacated a Fifth Circuit decision that a railroad worker's federal and state law claims were preempted by the RLA. *Id.*

[78] In the *Hawaiian Airlines* opinion, the Court specifically noted that Congress's objective in passing the RLA was "to promote stability in labor-management relations by providing a comprehensive framework for resolving labor disputes. To realize this goal, the [RLA] establishes a mandatory arbitral mechanism for 'the prompt and orderly settlement' of . . . disputes." 114 S. Ct. at 2243, 146 L.R.R.M. at 2580 (citations omitted) (quoting 45 U.S.C. § 151(a)).

Moreover, this ranking of competing objectives is not likely to change in the foreseeable future. *Hawaiian Airlines*, *Buell* and *Lingle* all were decided unanimously. Traditionally conservative Justices, including Chief Justice Rehnquist, who wrote the broadly preemptive *Andrews* opinion, joined with their more centrist and liberal colleagues.

The question remains, however, of how far the Court might further restrain the RLA's preemptive effect. No authority exists, for example, as to whether an affront to public policy would serve as sufficient grounds to avoid RLA preemption. The *Hawaiian Airlines* Court focused on Norris' retaliatory discharge claim and did not rule on his second claim of termination in disregard of FAA policy.[79] Yet, public policy concerns clearly can exist independent of any terms in an existing CBA. Moreover, ensuring safe air travel presents a policy goal perhaps every bit as compelling as protecting workers' rights.

However, the Court probably has gone as far as it is willing to go. Liberating claims based on public policy from RLA preemption could open up a pandora's box of opportunity for creative would-be litigants. Such a result would not just subordinate Congress's goal of ensuring quick settlement of labor disputes. Such a result could gut it entirely. The Court's refusal to even discuss whether a claim based on public policy liberates an aggrieved worker from RLA preemption probably heralds judicial reluctance to take such a step. For this reason, the Court will probably decline to endorse RLA preemption for minor disputes not grounded firmly in a federal or state statute.

In sum, in *Hawaiian Airlines*, a unanimous United States Supreme Court affirmed the right of aggrieved railroad and airline employees to file suit when their claims rest on a federal or state statute enacted to protect workers' rights. Because such statutes provide a cause of action independent of an existing CBA, the RLA will not preempt the litigation. In doing so, the Court implicitly overturned prior lower court decisions that declined to exempt state law causes of action from RLA preemption. In addition, the Court forestalled any attempt to narrowly construe the *Buell* holding as applicable only to causes of action based on FELA. The Court left unanswered the question of whether a cause of action based on violation of public policy would escape RLA preemption. Due to the flood of litigation possibilities an affirmative holding could spawn, the Court would probably decline to take such as step in the foreseeable future.

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[79] The Court granted certiorari only to determine if Norris' state law wrongful discharge claims were preempted by the RLA. Hawaiian Airlines, Inc. v. Norris, 114 S. Ct. 908 (1994).

III. Occupational Safety and Health Act

A. *Punitive and Compensatory Damages in Occupational Safety and Health Act Retaliatory Discharge Suits:* Reich v. Cambridgeport Air Systems, Inc.[1]

Section 11(c) of the Occupational Safety and Health Act ("OSHA") grants federal courts jurisdiction to order "all appropriate relief" in suits brought by the Secretary of Labor against employers who discharge employees in retaliation for exercising rights protected by OSHA.[2] OSHA does not state exactly what forms of remedies the phrase "all appropriate relief" incorporates.[3] The United States Supreme Court has consistently ruled in similar situations, where Congress expressly created a statutory right without delineating available remedies, that federal courts may use all normally available remedies to grant necessary relief.[4] Recently, the Supreme Court stated the general rule that,

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* By R. Daniel O'Connor, Staff Member, Boston College Law Review.

[1] 26 F.3d 1187 (1st Cir. 1994).

[2] Occupational Safety and Health Act § 11(c), 29 U.S.C. § 660(c) (1988). Section 11(c) provides in relevant part:

> (1) No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act . . . or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act.
> (2) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of this subsection may . . . file a complaint with the Secretary alleging such discrimination . . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall bring an action in any appropriate United States district court against such person. In any such action the United States district courts shall have jurisdiction, for cause shown to restrain violations . . . and order all appropriate relief including rehearing or reinstatement of the employee to his former position with back pay.

Id.

[3] *Id.* Section 11(c)(2) of OSHA provides a partial list of possible remedies (rehiring or reinstatement with back pay). *Id.* § 660(c)(2). This listing, however, does not limit the availability of other forms of remedies for claims arising under this subsection. *See id.* § 660(c), and discussion *infra* note 49.

[4] *See, e.g.*, J.I. Case Co. v. Borak, 377 U.S. 426, 433 (1964) ("[I]t is the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose."); Texas & N.O. R.R. Co. v. Brotherhood of Ry. and S.S. Clerks, 281 U.S. 548, 569–70 (1930) ("The creation of a legal right by [statutory] language suitable to that end does not require . . . the imposition of statutory penalties . . . . The right is created and the remedy exists."); Dooley v. United States, 182 U.S. 222, 229 (1901) ("[A] liability created by statute without a remedy may be enforced by a common-law action."). This longstanding tenet of American jurisprudence was first stated in Marbury v. Madison, 5 U.S. 137, 163 (1803). In *Marbury*, Chief Justice Marshall stated that our government made of laws, and not of men, would cease to exist if the courts could not grant a remedy for a violation of a vested right. *Id.*; *see also* Kendall v. United States, 37 U.S. 524, 624 (1838) ("[I]t will present . . . a monstrous absurdity in a well organized government,

absent clear congressional intent to the contrary, federal courts may grant all appropriate remedies even in cases brought pursuant to a right only implicitly granted by congressional statute.[5]

In 1964, in *J.I. Case Co. v. Borak*, the United States Supreme Court held that where a federal statute creates a cause of action without addressing available remedies, federal courts must provide any necessary remedy to protect the federally created right.[6] In *J.I. Case*, aggrieved stockholders sued their board members for money damages arising out of the board members' issuance of fraudulent proxy solicitation material.[7] The stockholders brought their claim pursuant to the Securities Exchange Act of 1934 (the "Act"), which prohibited issuance of fraudulent proxies.[8] The Court reasoned that Congress intended to protect investors by prohibiting issuance of fraudulent proxy materials, but did not delineate what remedies courts could employ to effectuate their protection.[9] The Court stated that the possibility of civil damages or injunctive relief accomplished the most effective prohibition of fraudulent proxies.[10] The *J.I. Case* Court concluded, therefore, that where a statute provided for a federally protected right, such as the right to receive non-fraudulent proxies, but did not address the issue of remedies, a federal court may provide whatever remedies, including monetary damages, necessary to achieve the congressional purpose.[11]

In 1992, in *Franklin v. Gwinnett County Public Schools*, the United States Supreme Court held that, absent clear direction to the contrary from Congress, federal courts may grant all appropriate remedies in a cause of action brought pursuant to a right, explicitly or implicitly granted by a federal statute.[12] In *Franklin*, a high school student sued her school district for its failure to take action to halt a teacher's known sexual harassment of the student.[13] The student sought money dam-

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that there should be no remedy, although a clear and undeniable right should be shown to exist. And if the remedy cannot be applied by the circuit court of this district, it exists nowhere.").

[5] Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1035, 59 Fair Empl. Prac. Cas. (BNA) 213, 217 (1992).

[6] *J.I. Case*, 377 U.S. at 433.

[7] *Id.* at 427. The stockholders alleged that a merger with another company would not have happened but for the fraudulent proxy statements, and that the stockholders were injured by the merger. *Id.* at 429–30.

[8] *Id.* at 427, 429–30. Section 14(a) of the Act prohibited the issuance of fraudulent proxy statements. *See id.* at 428 n.1. Section 27 of the Act granted federal district courts exclusive jurisdiction to hear any suits at law or equity brought to enforce any liability or duty created by the Act. *Id.* at 428 n.2.

[9] *Id.* at 432.

[10] *Id.*

[11] *J.I. Case*, 377 U.S. at 433.

[12] 112 S. Ct. 1028, 1035, 1036, 59 Fair Empl. Prac. Cas. (BNA) 213, 217, 218 (1992).

[13] *Id.* at 1031, 59 Fair Empl. Prac. Cas. (BNA) at 214.

ages for infringement of an implied right arising under Title IX of the Education Amendments of 1972 ("Title IX").[14] In reaching its holding, the Court looked at the state of the law on the availability of remedies prior to Congress's enactment of Title IX in 1972.[15] Additionally, the Court evaluated congressional intent as connoted by the 1986 and 1988 amendments to Title IX, enacted by a Congress aware of the Court's 1979 *Cannon v. University of Chicago*[16] decision, which created an implied right of action under Title IX.[17] The Court reasoned that Congress was cognizant of the traditional presumption of a federal court's ability to use all available remedies, both when Congress first enacted and later amended Title IX.[18] The Court concluded, therefore, that Congress's silence regarding remedies in these legislative actions indicated no desire to remove the traditional presumption, even where the cause of action arose from an implied statutory right.[19]

During the *Survey* year, in *Reich v. Cambridgeport Air Systems, Inc.*, the United States Court of Appeals for the First Circuit held that the authority of a district court under section 11(c) of OSHA to order "all appropriate relief" in a retaliatory discharge action embraced both compensatory and punitive damages.[20] The court applied this holding to affirm the district court's double back pay award to employees fired in retaliation for conduct protected by OSHA.[21] The court noted that the United States Supreme Court, in *Franklin*, presumed that federal courts had authority to grant "all appropriate remedies" where Congress had not spoken to the contrary, and defined the phrase to

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[14] *Id.* Title IX of the Educational Amendments of 1972 provides in pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (Supp. 1993).

[15] *Franklin*, 112 S. Ct. at 1035–36, 59 Fair Empl. Prac. Cas. (BNA) at 217.

[16] 441 U.S. 667, 669 (1979).

[17] *Franklin*, 112 S. Ct. at 1036, 59 Fair Empl. Prac. Cas. (BNA) at 217–18. In the ten years immediately prior to the passage of Title IX in 1972, the Court found an implied right of action in six different cases, and awarded money damages in three of those cases. *Id.* at 1036, 59 Fair Empl. Prac. Cas. (BNA) at 217. In the time period after the Court's 1979 creation of the implied right of action in *Cannon*, Congress twice amended Title IX, in 1986 and 1988. *Id.* at 1036, 59 Fair Empl. Prac. Cas. (BNA) at 217–18.

[18] *Id.* at 1036, 59 Fair Empl. Prac. Cas. (BNA) at 217–18. The Supreme Court stated that the weight of previous authority created a presumption that federal courts could use any available remedy to enforce a federally protected right. *Id.* at 1032–33, 1034, 59 Fair Empl. Prac. Cas. (BNA) at 215, 216.

[19] *Id.* at 1036–37, 59 Fair Empl. Prac. Cas. (BNA) at 218.

[20] 26 F.3d 1187, 1194 (1st Cir. 1994); *see also supra* note 2 for text of § 11(c)(2) of OSHA. Additionally, the First Circuit held that the district court did not clearly err in finding that the discharge of an employee because of his close connection to another employee previously fired in retaliation for activities protected by OSHA was in and of itself a retaliatory discharge. *Cambridgeport*, 26 F.3d at 1189.

[21] *Cambridgeport*, 26 F.3d at 1194–95.

include monetary and other damages normally available according to the particular case.[22] The First Circuit reasoned, therefore, that because the Supreme Court used the phrase "all appropriate remedies" to describe a wide scope of available damages, the Court would not likely construe Congress's explicit use of the phrase "all appropriate relief" within OSHA any less generously.[23] Additionally, the court conducted a detailed analysis of the legislative history of section 11(c) of OSHA to identify an absence of "clear direction" that Congress intended to deny the courts remedial powers to award compensatory and punitive damages.[24] The First Circuit concluded, therefore, that the statutory authority to grant "all appropriate relief" gave the district court the power, in necessary circumstances, to award compensatory damages and other traditional forms of relief, such as punitive damages.[25]

The controversy in *Cambridgeport* arose from a complaint brought by the Secretary of Labor (the "Secretary"), alleging that Cambridgeport Air Systems discharged two employees, Richardson and Roche, in retaliation for conduct protected by OSHA.[26] The Secretary requested damages for both employees in the amount of double the back pay over a stipulated period to compensate the loss of wages and other expenses associated with the discharge.[27] The United States District Court for the District of Massachusetts found that Cambridgeport Air Systems discharged Richardson in retaliation for making an admission to his employer that he had reported potential workplace health violations to the Occupational Safety and Health Administration.[28] The district court concluded, therefore, that Cambridgeport Air Systems' firing of Richardson violated section 11(c)(1) of OSHA.[29]

With respect to Roche's discharge, the district court found that the employer fired Roche not because of his protected activities, but because of his close relationship with Richardson.[30] The court noted that evidence proved the employer knew of Roche's and Richardson's

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[22] *Id.* at 1191.

[23] *Id.*

[24] *Id.* at 1192–94.

[25] *Id.* at 1194.

[26] Reich v. Cambridgeport Air Sys., No. Civ. A. 90–11628-MAA, 1993 WL 525605, at *1 (D. Mass. Aug. 25, 1993) [hereinafter *Cambridgeport I*]. See *supra* note 2 for a discussion of the complaint process under § 660(c).

[27] *Cambridgeport*, 26 F.3d at 1190.

[28] *Id.* at 1188. Richardson admitted during testimony that he did not actually report any violations, but felt that he needed to assert his rights. *See Cambridgeport I*, 1993 WL 525605, at *1.

[29] *Cambridgeport*, 26 F.3d at 1188.

[30] *Id.* at 1189.

close friendship.[31] The court reasoned that the employer fired Roche in an effort to clean house and found that the employer acted to set an example for other employees not to raise OSHA concerns.[32] The court concluded that Cambridgeport Air Systems' discharge of Roche also violated section 11(c) of OSHA, because it sought to limit conduct protected by OSHA.[33]

The district court characterized the employer's conduct, both in and out of court, as consistently brash and as displaying a flaunting disregard for the statutory prohibition.[34] Additionally, the court found that the employees would have remained employed over a stipulated period of time, such that their damages included back pay from this period, prejudgment interest and other non-specific additional damages.[35] The district court concluded, therefore, that the employer violated section 11(c) of OSHA, and awarded the employees damages equal to double their back pay.[36]

The employer appealed to the United States Court of Appeals for the First Circuit, claiming that the district court erred in finding Roche's discharge retaliatory.[37] The employer also appealed the damages award, stating that the district court lacked authorization to award what amounted to punitive damages under OSHA.[38] The Secretary contested Cambridgeport Air Systems' characterization of the damages as punitive, and although conceding that the award of double damages in an OSHA retaliatory discharge claim was unprecedented, insisted that the case represented the first time the Secretary actually requested such a remedy.[39]

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[31] *Cambridgeport I*, 1993 WL 525605, at *6.

[32] *Id.*

[33] *See id.*

[34] *Cambridgeport*, 26 F.3d at 1190.

[35] *Cambridgeport I*, 1993 WL 525605, at *5, *6. The district court was vague as to what constituted "additional damages," but implied that these damages were awarded to compensate for losses beyond back pay, and were not punitive. *See id.* at *5.

[36] *Cambridgeport*, 26 F.3d at 1188. Both parties stipulated that the time period in question was from the employee's discharge in June, 1989, until December 12, 1991 (the filing of the suit). *Id.* at 1189. The district court reviewed the evidence, which included contradictory testimony from several witnesses, and concluded that the employees would not have been laid off during this time period. *Id.*

[37] *Id.* at 1188. The employer did not appeal the district court's finding that Richardson's discharge was retaliatory. *Id.*

[38] *Id.* at 1190. Additionally, the employer appealed the district court's finding that the employees would not have been laid off during the time period relevant to this action (the parties had previously stipulated to the relevant time period). *Id.* at 1189. The First Circuit affirmed the district court's decision on this issue, giving broad deference to the district court's findings of fact. *Id.*

[39] *Id.* at 1190.

The First Circuit affirmed the district court's characterization of Roche's discharge as retaliatory.[40] The court noted that Roche's termination followed closely on the heels of Richardson's, and that the evidence supported the finding that the employer knew of the employees' close relationship.[41] The court found the district court's view of the evidence plausible in light of the record viewed in its entirety.[42] The First Circuit, therefore, affirmed the district court's decision, holding that the district court's finding that Cambridgeport Air Systems' termination of Roche violated section 11(c) of OSHA was not clearly erroneous.[43]

Next, the First Circuit addressed whether the district court had the power to grant punitive damages in general, and then if whether they were warranted in this specific case.[44] The court reasoned that even though *Franklin* dealt with an implied right of action, as opposed to the explicit right granted by Congress to the Secretary by section 11(c) of OSHA, the *Franklin* general rule controlled.[45] The *Franklin* general rule states that, absent clear congressional direction to the contrary, the federal courts may award any appropriate relief in a case brought pursuant to a right created either implicitly or explicitly by federal statute.[46] The First Circuit noted that the *Franklin* Court used the phrase "all appropriate remedies" when describing the authority of federal courts to grant monetary and other normal remedies, including punitive damages where dictated.[47] The First Circuit concluded that the Supreme Court, therefore, would not likely construe Congress's similar phrase, "all appropriate relief," in section 11(c) of OSHA any less generously.[48]

Concluding that the phrase "all appropriate relief" within OSHA implied the availability of monetary as well as punitive damages, the court then examined several sources for contrary congressional intent.[49] The court compared OSHA to several analogous statutes pro-

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[40] *Id.* at 1189.

[41] *Cambridgeport*, 26 F.3d at 1189. Additionally, there was evidence that Roche had been specifically warned about raising safety concerns. *Id.* The First Circuit also concluded that there were questions of witness credibility that rested particularly in the hands of the factfinder. *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.* at 1190, 1194.

[45] *Id.* at 1191.

[46] Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1035, 59 Fair Empl. Prac. Cas. (BNA) 213, 217 (1992).

[47] *Cambridgeport*, 26 F.3d at 1191.

[48] *Id.*

[49] *Id.* at 1191–94. The court rejected the employer's contention that the statute's listing of

tecting whistleblowers.[50] These later statutes explicitly included punitive and compensatory damages within the list of examples that followed the phrase "all appropriate relief, including but not limited to."[51] The court dismissed the argument that express inclusion of punitive damages provisions in later statutes meant Congress intended to exclude authorization for punitive damages in OSHA causes of action.[52] The court reasoned that giving this simple omission such credence did not comport with the *Franklin* Court's broad language, requiring "clear direction" to the contrary.[53] Conversely, the court concluded that the wording of these statutes indicated that Congress itself deemed the phrase "all appropriate relief" to encompass punitive and compensatory damages.[54]

Additionally, the court considered OSHA's legislative history to determine if Congress provided any guidance as to available remedies.[55] The court first analyzed the language in the Senate's initial version of the bill, which used the phrase "such affirmative action" to describe available remedies.[56] The court noted that as early as 1938, the United States Supreme Court interpreted the phrase "such affirma-

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several examples of relief indicated congressional intent to limit available remedies. *Id.* at 1191. The court cited to the *Franklin* decision to hold that the mere mention of included remedies is not a "clear direction" that other remedies are not available. *Id.* In support of this, the court noted that in 1941, the United States Supreme Court stated "the term 'including' is not one of all embracing definition, but connotes simply an illustrative application of the general principle." *Id.* (citing Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U.S. 95, 100 (1941) (failure of federal statute exempting federal land banks from state taxes to note "sales tax," in listing of several specific classes of tax exemption after term "including," did not preclude exemption from local sales tax)).

[50] *Id.* at 1191–92. For example, the court noted that 42 U.S.C. § 5851 protects whistleblowers in nuclear facilities from retaliatory discharge and discrimination. *Id.* at 1191. The jurisdiction provision of § 5851 provides in relevant part: "In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief, compensatory relief, and exemplary damages." 42 U.S.C. § 5851(d) (Supp. 1993). Additionally, the court looked at three other analogous whistleblower protection statutes, which included similar language. *Cambridgeport*, 26 F.3d at 1191–92; *see also* 15 U.S.C. § 2622(d) (Supp. 1993) (toxic substances) ("In actions brought under this subsection, the district courts shall have jurisdiction to grant all appropriate relief, including injunctive relief and compensatory and exemplary damages."); 42 U.S.C. § 300j-9(i)(4) (Supp. 1993) (safety of public water systems) (courts may "grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages"); 42 U.S.C. § 7622(d) (1988) (air pollution) (courts may "grant all appropriate relief including, but not limited to, injunctive relief, compensatory, and exemplary damages").

[51] *Cambridgeport*, 26 F.3d at 1191–92.

[52] *Id.* at 1192.

[53] *Id.* at 1191, 1192.

[54] *Id.* at 1191–92.

[55] *Id.* at 1192–94.

[56] *Cambridgeport*, 26 F.3d at 1192.

tive action" to exclude punitive damages.[57] In contrast, the court noted that the House of Representative's initial version of OSHA authorized the use of stringent civil and criminal penalties.[58] The court stated that if the language from the Senate's bill had been allowed to stand, it would have served as an indication of Congress's desire to prohibit punitive damages.[59] The court reasoned that the congressional compromise version used the intermediary "all appropriate relief" language because Congress wished to avoid similarities with earlier statutes which did not provide for punitive damages, but did not desire to authorize criminal penalties.[60]

Furthermore, the court stated that "all appropriate relief" more closely approximated the language of the Labor-Management Reporting and Disclosure Act of 1954 ("LMRDA").[61] The court noted that analogous language in LMRDA, "such relief . . . as may be appropriate," had been interpreted to authorize courts to grant punitive damages, prior to OSHA's passage.[62] The court reasoned that Congress worded OSHA's jurisdiction section cognizant of the court's interpretation of the analogous language in the LMRDA, and thus intended to grant the same remedial powers to the courts.[63] The court determined, therefore, that nowhere in the legislative history of OSHA did Congress provide any "clear direction" of an intent for the phrase "all appropriate relief" to limit courts' power to grant compensatory and punitive damages.[64] Thus, the First Circuit concluded that the district court had the power to grant punitive and compensatory damages in an OSHA retaliatory discharge action.[65]

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[57] *Id.* at 1193. The Senate's version stated that the Secretary in an administrative proceeding was to order "the person committing such violation to take *such affirmative action* to abate the violation as the Secretary deems appropriate, including but not limited to the rehiring or reinstatement of the employee to his former position with back pay." *Id.* at 1192 (emphasis added). The court also noted that "such affirmative action" was similar to the language of the National Labor Relations Act (the "NRLA"). *Id.*

[58] *Id.* at 1193.

[59] *Id.* The court noted that other courts interpreting statutes with language analogous to that of the NLRA had held that punitive damages were not allowed. *Id.* at 1193–94.

[60] *Id.* at 1193.

[61] *Cambridgeport*, 26 F.3d at 1194. Section 412 of the LMRDA, which describes the jurisdiction of federal courts in a LMRDA action, states in relevant part: "Any person whose rights secured by the provision of this subchapter have been infringed by any violation of this subchapter may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate." 29 U.S.C. § 412 (1988).

[62] *Cambridgeport*, 26 F.3d at 1194 (citing International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 199–201 (5th Cir.), *cert. denied*, 391 U.S. 935 (1968)).

[63] *Id.*

[64] *Id.*

[65] *Id.*

Having addressed and rejected the employer's claim that the district court did not have the authority to grant punitive damages, the First Circuit considered whether the decision to grant punitive damages in this specific case was clearly erroneous.[66] The First Circuit noted that courts traditionally possess the power in tort cases, such as retaliatory discharge cases, to award punitive damages where the defendant engaged in intentional or reckless conduct.[67] The court stated that the evidence supported a finding that the employees had suffered compensable losses because of their discharges in addition to lost wages, and that Cambridgeport Air Systems owed up to thirty-five percent of the back wages in prejudgment interest.[68] Additionally, the court found sufficient evidence that the employer's conduct was consistently brash and intentionally harmful to support punitive damages above these compensatory damages.[69] Thus, the First Circuit held that the district court's award of compensatory and punitive damages was not clearly erroneous.[70] The First Circuit concluded, therefore, that federal courts have the authority to grant compensatory and, when warranted, punitive damages, where an employer fires employees in retaliation for conduct protected by OSHA, or in an attempt to dissuade others from exercising their OSHA rights.[71]

The First Circuit's bold, well-reasoned proclamation that punitive damages are available in OSHA retaliatory discharge actions forms the most significant component of the *Cambridgeport* decision. Both the Secretary of Labor and the district court attempted to justify the double back wages award as purely non-punitive, and the First Circuit's

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[66] *Id.* at 1194–95. The First Circuit stated that as to the determination of the amount of damages great deference would be given to the judgment and discretion of the factfinder. *Id.* at 1195.

[67] *Cambridgeport*, 26 F.3d at 1192, 1194. The court relied upon a Seventh Circuit decision, *Travis v. Gary Community Mental Health Center*, which held that retaliatory discharge is an intentional tort. *Id.* at 1192 (citing Travis v. Gary Community Mental Health Center, 921 F.2d 108, 111–12 (7th Cir.), *cert. denied*, 112 S. Ct. 60 (1991)). In *Travis*, the plaintiff alleged that she was fired for conducting actions protected by the Fair Labor Standards Act, which, similar to OSHA, provided a retaliatory discharge cause of action but did not explicitly prescribe available remedies. *Travis*, 921 F.2d at 111–12. Judge Easterbrook held, after conducting statutory interpretation similar to the *Cambridgeport* court, that punitive damages were available in a retaliatory discharge action because a retaliatory discharge was at its heart an intentional tort. *Id.* at 112.

[68] *Cambridgeport*, 26 F.3d at 1195.

[69] *Id.* The First Circuit cited several instances that the district court listed as indicative of the employer's egregious behavior: a possible bribe offered by the employer to a Labor Department investigator, the employer's strong witness supervision, questionable employer witness testimony, and the very rapid manner in which the employer discharged the first employee (less than six hours later in the same day). *Id.*

[70] *Id.*

[71] *Id.* at 1194–95.

decision renders such legal gymnastics unnecessary.[72] The First Circuit's careful and detailed analysis proves conclusively that punitive, as well as compensatory, damages are available weapons in the Secretary's arsenal for use in OSHA retaliatory discharge actions.[73] This is significant because during the past twenty-two years in which section 11(c) has been in place, the Secretary of Labor never sought punitive damages in OSHA retaliatory discharge actions.[74] This prior policy limited employers' potential liability for violating section 11(c) to typically meager back pay claims. Allowing the courts to grant punitive damages, however, turns section 11(c) into a potent force for punishing employers who discriminate against employees for engaging in conduct protected by OSHA. Additionally, the potentially unpredictable liability for punitive damages serves as a key deterrent against employer intervention in an employee's quest for a safe work place.[75]

Practitioners and employers should be aware that other courts will probably follow the First Circuit's analysis on the availability of punitive damages in OSHA retaliatory discharge actions. The First Circuit applied a rigorous statutory interpretation methodology that builds upon the reasoning of the United States Supreme Court in *Franklin*.[76] The court's in-depth analysis provides considerable insight into the reasoning behind the court's holding, which, because of its inclusiveness, seemingly forecloses any possible avenues of attack. Additionally, in light of the *Cambridgeport* decision, the Department of Labor has instituted a policy of seeking compensatory and punitive damages in all appropriate OSHA retaliatory discharge actions.[77] Assuming that a facial challenge to the availability of punitive damages in an OSHA

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[72] *See id.* at 1190; *see also Cambridgeport I*, No. Civ. A. 90–11628-MAA, 1993 WL 525605, at *5 (D. Mass. Aug. 25, 1993). The district court was vague as to what constituted "additional damages," but implied that these damages were awarded to compensate for losses beyond back pay, and were not punitive. *See Cambridgeport I*, 1993 WL 525605, at *5.

[73] *Cambridgeport*, 26 F.3d at 1190–95.

[74] *See id.*

[75] This may be especially true given the media attention surrounding a recent California sexual harassment claim, in which a jury awarded an employee, who worked at a firm for only 25 days, $7.2 million in punitive damages and $50,000 in compensatory damages. *See* Mark v. Boennighausen, *$7.2 Million Secretary*, AM. LAW., Oct. 1994, at 76.

[76] *See Cambridgeport*, 26 F.3d at 1190–94; *see also* Franklin v. Gwinnett County Pub. Sch., 112 S. Ct. 1028, 1032–37, 59 Fair Empl. Prac. Cas. (BNA) 213, 214–18 (1992). Additionally, the detailed statutory interpretation methodology applied by the First Circuit serves as an excellent guide for practitioners to use when attempting to discern what remedies are available in other statutory landscapes.

[77] Telephone Interview with Mark Lerner, Attorney, Division of Occupational Safety and Health, Office of the Solicitor, United States Department of Labor (Nov. 1, 1994).

retaliatory discharge suit is unlikely to succeed, employers are therefore left to challenge punitive damages only on an "as applied" basis.[78]

In sum, the First Circuit in *Cambridgeport* held conclusively that punitive and compensatory damages were available in OSHA retaliatory discharge actions.[79] This decision followed naturally from the *Franklin* general rule that, absent congressional direction to the contrary, courts may utilize whatever remedies are appropriate to enforce an explicit or implicit statutorily created right.[80] Practitioners can expect that other courts will follow the First Circuit's detailed reasoning in awarding punitive and compensatory damages in section 11(c) retaliatory discharge actions, and that the Secretary of Labor will utilize this precedent to its maximum potential in furthering the policy concerns of OSHA.

IV. CONTEMPT FINES

A. **The Distinction Between Civil and Criminal Contempt of Court:* International Union, United Mine Workers of America v. Bagwell[1]

In the context of labor disputes, court orders or injunctions are powerful weapons for an employer attempting to control a striking union.[2] When a union violates a court order or injunction, courts categorize the violation as an "indirect" contempt of court because the violating actions usually occur outside the courtroom.[3] Over the years the United States Supreme Court has attempted to set standards that distinguish between criminal and civil contempt of court and the procedural treatment accorded each.[4]

The United States Supreme Court began its analysis of civil and criminal contempt law by following the precedent set forth in English common law.[5] This law has evolved such that civil and criminal con-

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[78] *See generally* Smith v. Wade, 461 U.S. 30, 35 (1983) (detailed discussion as to what standard should generally be applied to determine when punitive damages are available).

[79] *Cambridgeport*, 26 F.3d at 1194.

[80] *See Franklin*, 112 S. Ct. at 1034–35, 59 Fair Empl. Prac. Cas. (BNA) at 215–16.

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[1] 114 S. Ct. 2552, 146 L.R.R.M. 2641 (1994).

[2] *See, e.g., id.* at 2555, 146 L.R.R.M. at 2642; United States v. United Mine Workers of America, 330 U.S. 258, 266–67, 19 L.R.R.M. 2346, 2348–49 (1947); Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 234–35 (1917); *In re* Debs, 158 U.S. 564, 571 (1895).

[3] *Bagwell*, 114 S. Ct. at 2557 n.2, 146 L.R.R.M. at 2643 n.2.

[4] *Id.* at 2557–59, 146 L.R.R.M. at 2643–44.

[5] Earl C. Dudley, Jr., *Getting Beyond the Civil/Criminal Distinction: A New Approach to the Regulation of Indirect Contempts*, 79 VA. L. REV. 1025, 1035 (1993).

tempt require different procedural processes.[6] If a court determines that a contempt is civil in nature, the court may act summarily; however, a court must grant a defendant the rights afforded in all criminal proceedings under the Sixth Amendment[7] before it may convict a defendant of criminal contempt.[8] Although such a distinction may appear easy to apply, the Supreme Court has experienced considerable difficulty in defining civil and criminal contempt in a manner that helps lower courts to evaluate and apply the correct procedures in each instance.[9]

The United States Supreme Court, in the 1910 case *Gompers v. Bucks Stove & Range Co.*, held that contempt of court for the violation of an injunction that was punished by a fixed prison sentence was criminal in nature.[10] In this case, three individuals who were members of the American Federation of Labor and publishers of a widely-read newspaper, the *American Federationist*, had initiated a boycott of the Bucks Stove and Range Company by publishing information regarding the company's alleged unfair labor practices.[11] The boycott caused the business irreparable harm.[12] Bucks Stove sought and received an injunction from the Supreme Court of the District of Columbia ordering the unionists to cease their actions in furthering the boycott.[13] Some months later the company filed a petition alleging violations of the injunction,[14] and thereafter, the judge found the three individuals guilty of contempt of court and sentenced them to fixed prison terms of six, nine and twelve months according to their degree of involvement.[15] The defendants applied for and obtained a writ of certiorari.[16]

The United States Supreme Court held that the distinction between criminal and civil contempt turned on the "character and purpose" of the punishment prescribed.[17] The Court reasoned that a civil contempt order is remedial in that the judge intends to coerce the

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[6] *See Bagwell*, 114 S. Ct. at 2559, 146 L.R.R.M. at 2645.

[7] U.S. CONST. amend. VI.

[8] Bloom v. Illinois, 391 U.S. 194, 198–200 (1968).

[9] *See, e.g., Bagwell*, 114 S. Ct. at 2561, 146 L.R.R.M. at 2646–47; Shillitani v. United States, 384 U.S. 364, 369–70 (1966); United States v. United Mine Workers of America, 330 U.S. 258, 303–04, 19 L.R.R.M. 2346, 2364–65 (1947); Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 441–42 (1910).

[10] 221 U.S. at 444.

[11] *Id.* at 419–20.

[12] *Id.* at 420.

[13] *Id.* at 421–22 & n.1.

[14] *Id.* at 436.

[15] *Gompers*, 221 U.S. at 424–25.

[16] *Id.* at 427.

[17] *Id.* at 441.

defendant to comply with the order for the benefit of the complainant.[18] With a criminal contempt order, on the other hand, the judge attempts to vindicate the authority of the court, and therefore, the sanction is punitive.[19] The Court noted that although coercive sanctions may have the incidental effect of being punitive, and vice versa, these indirect consequences do not affect the nature of the punishment.[20] Applying this rationale to the specific facts of *Gompers*, the Court held that the fixed prison terms punished the defendants, and thus the contempt was criminal in nature.[21]

Similarly, in 1947, the United States Supreme Court in *United States v. United Mine Workers of America*, held that a definite flat fine of $700,000 and a purgeable contempt fine of $2,800,000 for violation of an injunction restraining the United Mine Workers of America from interfering with the operation of certain coal mines were criminal and civil, respectively.[22] The Court ordered the union to pay $700,000 for past violations of the injunctions against work stoppages and to pay $2,800,000 in the event that the union did not, within five days of the decision, completely comply with the terms of the restraining order.[23] The *United Mine Workers* Court brought the *Gompers* distinction between coercive and punitive imprisonment to the context of contempt fines.[24] The Court held that civil contempt fines either (i) coerce the defendant into compliance with the court's order, or (ii) compensate the complainant for losses sustained.[25] The Court also noted that punitive fines are necessarily criminal in nature.[26] The Supreme Court classified the flat and purgeable fines issued to the union and its president as punitive and coercive, respectively, and thus held that their contempt was both criminal and civil.[27]

In the 1966 case, *Shillitani v. United States*, the United States Supreme Court held that any sentence that the court conditions upon the contemnor's willingness to comply with the court order is neces-

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[18] *Id.*

[19] *Id.*

[20] *Gompers*, 221 U.S. at 443.

[21] *Id.* at 444.

[22] *See* 330 U.S. 258, 304–05, 19 L.R.R.M. 2346, 2364 (1947).

[23] *Id.*

[24] *Id.* at 302–04, 19 L.R.R.M. at 2363.

[25] *Id.* at 303–04, 19 L.R.R.M. at 2363.

[26] *Id.* at 302, 19 L.R.R.M. at 2363.

[27] *United Mine Workers*, 330 U.S. at 304–05, 19 L.R.R.M. at 2364. The Court also stated that as long as the defendant was not asked to testify and the court used the "reasonable doubt" standard to determine the defendant's guilt, civil and criminal sanctions could be heard in the same proceeding. Dudley, *supra* note 5, at 1057.

sarily civil.[28] In this case, the court found two men guilty of contempt of court for refusing to testify in front of a grand jury after the judge had granted them immunity.[29] The Court imposed a two-year prison sentence with the provision that if either defendant agreed to testify before that time, he would be released.[30] Stressing the conditional nature of the sentencing which allowed the defendants to "carry the keys of their prison in their own pockets," the Supreme Court categorized the punishment as coercive rather than punitive.[31] Therefore, because in this case the court clearly intended to coerce the defendants to testify, the Supreme Court found the contempt action to be civil.[32]

Further developing this area of the law, in 1968, the United States Supreme Court in *Bloom v. Illinois* held that a defendant in a criminal contempt proceeding has the right to a jury trial.[33] In this case, the court convicted the defendant of criminal contempt for attempting to admit a falsely prepared and executed will to probate after the death of the testator.[34] The Supreme Court reasoned that criminal contempt was no less a crime than any other criminal action.[35] Thus, the Court concluded, courts must accord defendants in criminal contempt actions the same procedural due process as defendants in other criminal actions.[36] The Court in *Bloom* brought criminal contempt proceedings directly within the ambit of the Sixth Amendment[37] and expressly applied the Amendment's requirements to both state and federal criminal contempt proceedings.[38] In so doing, the Court guaranteed the right to a jury trial for criminal contempt in all but petty offenses.[39] In this case, the Court held that the defendant had the right to a jury trial because his act of forgery was a non-petty offense carrying a statutory sentence of one to fourteen years.[40]

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[28] 384 U.S. 364, 370 (1966).

[29] *Id.* at 365.

[30] *Id.*

[31] *See id.* at 368.

[32] *Id.*

[33] 391 U.S. 194, 201–02 (1968).

[34] *Id.* at 195.

[35] *Id.* at 201–02.

[36] *Id.* at 202.

[37] U.S. CONST. amend. VI.

[38] *Bloom*, 391 U.S. at 198–200.

[39] *See id.* at 210. This long-recognized exception to the right to a jury trial, when applied to contempt proceedings, allows a judge to maintain control of his courtroom by punishing petty criminal contempt summarily, while also protecting the constitutional rights of those whose conduct outside the courtroom is more egregious. *See id.* at 209–10.

[40] *See id.* at 211.

In *Hicks v. Feiock*, a 1988 case, the United States Supreme Court held that a contempt sentence that includes a probationary period with a suspended but determinate prison sentence is criminal unless the court conditions the prison sentence on compliance with court order.[41] The defendant in *Hicks* owed past-due court-ordered child support payments.[42] In his contempt hearing, the California state court sanctioned the defendant in two ways.[43] The court ordered the defendant to begin paying his arrearages on a monthly basis during a three-year probationary period, after which he was ordered to serve a twenty-five-day prison sentence.[44] On appeal the United States Supreme Court reasoned that a probation period with a suspended determinate sentence is not the same as a conditional sentence that allows the contemnor to purge the sanctions.[45] To the contrary, the Court noted that during such a probationary period, a contemnor suffers numerous disabilities that compliance with previous court orders cannot purge.[46] The Court reasoned that if, on remand, the lower court held that the defendant could purge his prison sentence by repaying all arrearages during his probation, then the contempt order was civil in nature because allowing the defendant to hold the key to his prison makes a sanction coercive.[47] On the other hand, the Court explained that if the lower court sanctioned the defendant with a straight probationary period plus suspended determinate sentence, the contempt was criminal because these two sanctions were punitive in nature.[48]

During the *Survey* year, in *International Union, United Mine Workers of America v. Bagwell*, the United States Supreme Court reversed a Virginia Supreme Court decision that held $52,000,000 in fines payable to the state of Virginia to be civil contempt fines.[49] The United States Supreme Court held that in determining the criminal or civil nature of a contempt action, a court must look beyond the standards established historically by *Gompers* and its progeny.[50] In addition, a court must look at the objective need for a jury trial to ensure disinterested fact finding and even-handed adjudication.[51] Accordingly, the Court

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[41] 485 U.S. 624, 641 (1988).
[42] *See id.* at 627.
[43] *Id.* at 639.
[44] *Id.*
[45] *Id.* at 639 n.11.
[46] *Hicks*, 485 U.S. at 639 n.11.
[47] *See id.* at 640–41.
[48] *See id.* at 639 n.11.
[49] 114 S. Ct. 2552, 2563, 146 L.R.R.M. 2641, 2648 (1994).
[50] *See id.* at 2562, 146 L.R.R.M. at 2647.
[51] *Id.*

held that the contempt was criminal and the union had a constitutional right to a jury trial.[52]

The International Union, United Mine Workers of America and the United Mine Workers of America, District 28 ("the union") were involved in a lengthy labor dispute with the Clinchfield Coal Company and Sea "B" Mining Company ("the companies") over alleged unfair labor practices.[53] In April of 1989 the companies filed suit to enjoin the union from certain strike-related activities.[54] The Circuit Court for Russell County, Virginia, entered an injunction that prohibited the union from picketing near the entrance and exit of the companies, from throwing objects at and physically threatening company employees and from placing damaging "jackrocks" under the tires of company vehicles.[55] The court also limited the number of employees who could simultaneously picket and required the union to provide supervisors on the picket lines to ensure that the strikers adhered to the court order.[56]

At a hearing on May 16, 1989, the Russell County Circuit Court found that the union had committed 72 violations of the April injunction.[57] The court fined the union $642,000[58] and stated that it would fine the union $100,000 for each future violent violation and $20,000 for each non-violent violation.[59] Subsequently, the court conducted seven contempt hearings and held the union in contempt for over 400 violations of the injunction.[60] Based on its assertion that the fines were civil in nature, the court conducted each hearing as a civil proceeding before the judge.[61] In each case, although the judge required the companies to prove the union's violations beyond a reasonable doubt, it did not provide the union with a jury trial.[62] In total, the Virginia judge fined the union over $64,000,000, $12,000,000 of which the court ordered the union to pay to the companies and approximately $52,000,000 of

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[52] *Id.* at 2563, 146 L.R.R.M. at 2648.

[53] *Id.* at 2555, 146 L.R.R.M. at 2642.

[54] *Bagwell*, 114 S. Ct. at 2555, 146 L.R.R.M. at 2642.

[55] *Id.*

[56] *Id.*

[57] *Id.*

[58] *Id.* at 2555 & n.1, 146 L.R.R.M. at 2642 & n.1. The Russell County Circuit Court suspended a portion of these fines, conditioning them on the union's future compliance with the injunction, and later vacated these fines when it concluded that they were criminal in nature. *Id.*

[59] *Bagwell*, 114 S. Ct. at 2555, 146 L.R.R.M. at 2642.

[60] *Id.*

[61] *Id.*

[62] *Id.*

which the court ordered the union to pay to the State of Virginia, and to Russell and Dickenson Counties.[63]

During the union's appeal, the companies settled the dispute with the union and agreed to vacate the contempt fines.[64] Moreover, the parties mutually moved to drop the case.[65] The State of Virginia and the county governments supported the motion to vacate the fines, but the Circuit Court, after dismissing the case and vacating the $12,000,000 owed to the companies, refused to vacate the fines owed to the state and county governments.[66] The court reiterated its earlier statements regarding the civil and coercive nature of the fines and stated that the fines were "payable in effect to the public" for the excessive law enforcement necessitated by the strike.[67]

The State of Virginia appointed John Bagwell as special commissioner to collect the unpaid contempt fines because the companies withdrew and refused to pursue the issue any further.[68] On appeal, the Virginia Court of Appeals reversed and held that the district court lacked the discretion to refuse to vacate the fines once the civil case settled because the court had ordered the fines for civil contempt.[69] The Virginia Supreme Court, however, reversed this decision, holding that the public policy of Virginia disfavored the rule articulated by the Court of Appeals because it damaged public respect for the judiciary.[70] Furthermore, the Virginia Supreme Court subsequently rejected the union's plea for a jury trial based on the union's contention that the fines were criminal.[71] The court reasoned that because the judge had articulated the schedule of fines at the first hearing, the union could have minimized its own penalty.[72] Thus, the Virginia Supreme Court found the fines to be coercive and civil in nature.[73]

The United States Supreme Court disagreed with the Virginia Supreme Court and reversed.[74] The Court held that because the fines were criminal in nature, only a jury could impose them.[75] In so con-

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[63] *Id.* at 2556, 146 L.R.R.M. at 2642.
[64] *Bagwell*, 114 S. Ct. at 2556, 146 L.R.R.M. at 2642.
[65] *Id.*
[66] *Id.*
[67] *See id.*
[68] *Id.* The attorneys for the counties also withdrew. *Id.*
[69] *Bagwell*, 114 S. Ct. at 2556, 146 L.R.R.M. at 2642.
[70] *See id.*, 146 L.R.R.M. at 2642–43.
[71] *Id.*, 146 L.R.R.M. at 2643.
[72] *See id.*
[73] *Id.*, 146 L.R.R.M. at 2642–43.
[74] *Bagwell*, 114 S. Ct. at 2563, 146 L.R.R.M. at 2648.
[75] *Id.* at 2555, 146 L.R.R.M. at 2641.

cluding, the Court drew a distinction between fixed, determinate and retrospective criminal fines, and purgeable per diem fines.[76] The fines at issue more closely resembled fixed, determinate fines and thus compelled categorization as criminal.[77] The Court further reasoned that the breadth and complexity of the lower court's injunction regulating out-of-court conduct, and the severity of the fines imposed, necessitated the extensive even-handed fact finding of a jury trial.[78]

The Court began its discussion by reiterating the standard definitions of civil and criminal contempt sanctions as established in *Gompers* and its progeny.[79] The Court first acknowledged the punitive nature of criminal contempt fines.[80] It then re-stated the *United States v. United Mine Workers of America* definition of a civil contempt fine as one that either coerces a defendant into compliance with a court order, or compensates the complainant for losses sustained.[81] The Court further explained that a non-compensatory contempt fine is only civil if the contemnor has the ability to purge the fine as in the case of a per diem or fixed, suspended fine.[82]

The Supreme Court explained that most contempt sanctions share punitive and coercive aspects, and therefore the question underlying the distinction between civil and criminal contempt focuses on the degree of process due for the imposition of any particular contempt sanction.[83] The Court noted that judges need the power of contempt in order to retain their authority both in the courtroom and in society.[84] The Court did recognize, however, that the fact that judges may abuse such power necessitates procedural limitations to protect defendants from arbitrary justice.[85] Historically, the Court noted, the Supreme Court has attempted to strike a balance between these two concerns by permitting judges to exercise their power with minimal constraints when petty contempt threatens the order in the courtroom, while placing the most constraints on their power when the court is dealing with long-term, complex contempt.[86]

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[76] *Id.* at 2562, 146 L.R.R.M. at 2647.

[77] *Id.*

[78] *See id.*

[79] *See Bagwell*, 114 S. Ct. at 2557–59, 146 L.R.R.M. at 2643–44.

[80] *See id.* at 2558, 146 L.R.R.M. at 2644.

[81] *Id.*

[82] *Id.* The court noted that the *Hicks* case may reach a different conclusion regarding suspended criminal sentences, but did not attempt to reconcile the two cases. *Id.* The most probable reason for this is that the case at hand does not raise the issue of prison sentences.

[83] *See id.* at 2559, 146 L.R.R.M. at 2645.

[84] *See Bagwell*, 114 S. Ct. at 2559, 146 L.R.R.M. at 2645.

[85] *Id.*

[86] *Id.* at 2559–60, 146 L.R.R.M. at 2645.

After reviewing its past handling of the issue, the Court enunciated four categories of contempt and the respective procedures due each.[87] First the Court discussed the category of direct contempts in the presence of the court.[88] Trial courts may summarily adjudicate such contempts to maintain order in the courtroom.[89] The Court's second category consists of direct contempts that the judge delays punishing until after the proceeding.[90] Such contempt requires notice and a hearing because in such an action the judge can no longer argue that maintaining order requires summary proceedings.[91] The third category, according to the Court, comprises indirect contempts that impede the court's ability to adjudicate the proceedings before it,[92] or those involving discrete, readily ascertainable acts.[93] A court should deal with this category of contempt through civil proceedings because of the limited need for extensive impartial fact finding in these cases.[94] The fourth category defined by the Court comprises indirect contempts that involve out-of-court violations of complicated court orders or injunctions.[95] Contempts in this category require sophisticated fact finding, noted the Court, and have minimal need of instantaneous adjudication.[96] All of these circumstances, the Court maintained, require criminal procedural protections to guard the due process rights of the defendant.[97]

Applying this legal framework to the specific facts of the case, the Court reasoned that because neither the parties nor any Virginia court characterized the fines as compensatory, it must determine whether they were coercive civil fines or criminal fines.[98] The Court acknowledged the difficulty it faced in attempting to distinguish the fines imposed from either determinate punitive fines or from initially suspended fines, but refused to accept the petitioner's argument that the Russell County Circuit Court's advance announcement of the fine schedule made the fines coercive.[99] Rather, the Court analogized these fines to general criminal laws that provide prior notice of the prohibi-

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[87] *See id.* at 2560–61, 146 L.R.R.M. at 2645–46.

[88] *Id.* at 2560, 146 L.R.R.M. at 2645.

[89] *Bagwell*, 114 S. Ct. at 2560, 146 L.R.R.M. at 2645.

[90] *Id.*

[91] *Id.*

[92] *See id.*, 146 L.R.R.M. at 2645–46. An example is the failure of one of the parties to comply with discovery orders. *Id.*

[93] *Id., 146 L.R.R.M. at 2646. An example is the turning over of a key. Id.*

[94] *Bagwell*, 114 S. Ct. at 2560, 146 L.R.R.M. at 2646.

[95] *Id.*

[96] *Id.*

[97] *Id.* at 2561, 146 L.R.R.M. at 2646.

[98] *Id.*

[99] *Bagwell*, 114 S. Ct. at 2562, 146 L.R.R.M. at 2647.

tion and the potential punishment.[100] In holding that the fines were criminal, the Court compared the fines to fixed, determinate, retroactive fines that petitioners had no opportunity to purge, and emphasized the complicated nature of the injunction, the lengthy time period covered and the magnitude of the fines.[101] The Court declared that to protect the defendant's rights, the circumstances of this contempt action necessitated the disinterested fact finding and even-handed adjudication of a jury trial.[102] The Court recognized that this decision may obstruct the path of some judges' attempts to sanction widespread indirect contempts.[103] The Court stated, however, that the need to promote and preserve respect for judges could not outweigh the importance of protecting individuals from subjection to serious criminal sanctions without the protection of due process.[104]

In a concurring opinion, Justice Scalia stated that the Court need not attempt to reconcile the different tests employed to distinguish criminal and civil contempts because in this extreme case, all tests would indicate that these contempt fines are criminal in nature.[105] He suggested that when the Court finally did need to reconcile the standards, such a reconciliation would require a careful examination of historical practice in relation to modern judicial order.[106] Justice Scalia also suggested, however, that in the near future courts will need to make adjustments to the contempt process because the modern judicial order has evolved such that the historical distinctions no longer apply.[107]

Justice Ginsburg, joined by Chief Justice Rehnquist, concurred in part and concurred in the judgment.[108] Justice Ginsburg followed the *Gompers* reasoning more closely than the majority and stated that to call these fines civil simply because some may classify them as "coercive" and "conditional" is to open the civil contempt category to all possible sanctions.[109] As the majority stated, the descriptive terms "coercive" and "punitive" will almost always overlap.[110] Additionally, Justice

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[100] *See id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 2563, 146 L.R.R.M. at 2648.

[104] *Bagwell*, 114 S. Ct. at 2563, 146 L.R.R.M. at 2648.

[105] *Id.* (Scalia, J., concurring).

[106] *See id.* at 2563–65, 146 L.R.R.M. at 2648–50 (Scalia, J., concurring).

[107] *See id.* (Scalia, J., concurring).

[108] *Id.*

[109] *Bagwell*, 114 S. Ct. at 2567, 146 L.R.R.M. at 2650 (Ginsburg, J., concurring in part and concurring in the judgment).

[110] *See id.* at 2566, 146 L.R.R.M. at 2650 (Ginsburg, J., concurring in part and concurring in the judgment).

Ginsburg reasoned that the fact that the Virginia circuit court refused to vacate the fines despite the settlement of the civil case indicates that the court's purpose was to vindicate its authority.[111] Therefore, basing her decision on the definition set out in *Gompers*, Justice Ginsburg found the fines criminal.[112]

In sum, the United States Supreme Court held in *International Union, United Mine Workers of America v. Bagwell* that in distinguishing between coercive civil contempt fines and criminal contempt fines, a court must look beyond the traditional standard established in *Gompers*.[113] A court must also consider the necessity of a jury trial to effectuate justice.[114] In *Bagwell*, the Court had difficulty categorizing the prospective fines as either coercive or punitive according to the *Gompers* standard.[115] The Court stated, however, that the fines were more closely analogous to fixed, determinate criminal fines.[116] In addition, the Court reasoned that the complexity of the injunction, the duration of the contumacy, and the magnitude of the fines made a jury trial essential to protect the rights of the defendant.[117] Thus, the United States Supreme Court's decision in *Bagwell* essentially requires courts to grant defendants criminal procedure in any case involving widespread, indirect contempts of complex injunctions unless the sanction imposed will be a compensatory fine.[118]

By considering the nature and circumstances of the alleged contempt, the *Bagwell* Court liberalized the standard that courts apply to distinguish between civil and criminal contempt of court.[119] The underlying purpose of distinguishing between civil and criminal contempt of court is to protect defendants from arbitrary decisions in cases where they face serious criminal punishment.[120] The *Bagwell* decision helps to ensure that defendants in most need of procedural protection receive it.[121]

In a case such as *Bagwell*, which blurs the distinction between punitive and coercive fines, a court may encounter difficulty in determining which procedure to grant the defendant according to the standard set forth in *Gompers* and its progeny.[122] Under *Bagwell*, however, the *Gom-*

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[111] *Id.* at 2567, 146 L.R.R.M. at 2651 (Ginsburg, J., concurring in part and concurring in the judgment).

[112] *See id.* (Ginsburg, J., concurring in part and concurring in the judgment).

[113] *See id.* at 2562, 146 L.R.R.M. at 2647.

[114] *See Bagwell*, 114 S. Ct. at 2562, 146 L.R.R.M. at 2647–48.

[115] *Id.*, 146 L.R.R.M. at 2647.

[116] *Id.*

[117] *Id.*

[118] *See id.*

[119] *See Bagwell*, 114 S. Ct. at 2562, 146 L.R.R.M. at 2647.

[120] *See id.* at 2563, 146 L.R.R.M. at 2648.

[121] *See id.*

[122] *See id.* at 2562, 146 L.R.R.M. at 2647.

pers test is only a first step in determining the procedure a court should accord a particular defendant.[123] The Court has added to this traditional standard the new requirement that a court look at the defendant's need for protection when determining what type of contempt proceeding is necessary.[124] This new requirement will fine tune the standard in a manner that will better reconcile it with its original purpose.

The *Bagwell* holding has important implications in the context of labor disputes because it will affect most indirect contempt cases.[125] The violation of an injunction against strike-related practices, for example, is by nature an indirect contempt because all such acts or omissions typically occur outside the courtroom.[126] For this reason, unless the fine imposed by the court is petty or compensatory, in all labor disputes where the injunction issued is suitably "complex," the court will consider the contempt action criminal and then must provide the defendant with criminal process.[127]

As a practical matter the Supreme Court in *Bagwell* has broadened the category of contempt cases that are considered criminal. In the future, criminal contempt cases will include both cases that are considered criminal because the sanctions imposed were punitive and cases where the distinction between punitive or coercive sanctions is blurred.[128] In the latter cases, if a court finds that a serious contempt is at issue, the need for disinterested fact finding and even-handed adjudication may be sufficient to categorize a contempt action as criminal.[129]

In conclusion, the Supreme Court in *International Union, United Mine Workers of America v. Bagwell* held that in addition to categorizing the sanctions as coercive, compensatory or punitive, courts must look at the objective need for a jury trial when determining the civil or criminal nature of contempt.[130] In so holding, the Court has significantly expanded the category of contempt actions considered criminal and thus requiring a jury trial.[131] This expansion means that courts must categorize most contempts that arise in the context of labor disputes as criminal, and thus provide the defendant in such cases with all the procedural protections of the Sixth Amendment.[132]

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[123] *See id.*

[124] *See Bagwell*, 114 S. Ct. at 2563, 146 L.R.R.M. at 2648.

[125] *See id.*

[126] *See id.* at 2557 n.2, 146 L.R.R.M. at 2643 n.2.

[127] *See id.* at 2563, 146 L.R.R.M. at 2648.

[128] *See id.* at 2562–63, 146 L.R.R.M. at 2647–48.

[129] *See Bagwell*, 114 S. Ct. at 2562, 146 L.R.R.M. at 2647.

[130] *Id.*, 146 L.R.R.M. at 2647.

[131] *See id.*

[132] U.S. CONST. amend. VI; *see Bagwell*, 114 S. Ct. at 2562–63, 146 L.R.R.M. at 2647–48.

EMPLOYMENT DISCRIMINATION LAW

I. STATUTORY RETROACTIVITY

A. **The Retroactivity of the Civil Rights Act of 1991 and § 1981:* Rivers v. Roadway Express[1]

On November 21, 1991, the Civil Rights Act of 1991 ("CRA") became law.[2] Congress enacted the CRA, in part, as a response to several United States Supreme Court decisions that restricted the rights of plaintiffs alleging discrimination.[3] The CRA did not, however, clearly indicate when its provisions should come into effect.[4] As a result, courts have differed over whether to apply the CRA or prior Supreme Court rulings to cases or conduct arising prior to the CRA's passage.[5] The Supreme Court's own decisions have presented two apparently contradictory rules for determining whether a statute should apply retroactively—one suggesting that a court should generally apply the law in effect at the time of its decision, and the other suggesting an ancient presumption against giving a statute retroactive effect.[6]

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[1] 114 S. Ct. 1510, 64 Fair Empl. Prac. Cas. (BNA) 842 (1994).

[2] Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[3] *See* CRA § 3(4). Section 3 provides in relevant part: "The purposes of this Act are . . . (4) to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." *Id.*; *see also* Michele A. Estrin, *Retroactive Application of the Civil Rights Act of 1991 to Pending Cases*, 90 MICH. L. REV. 2035, 2050–51, 2053 (1992); Brian Neff, Note, *Retroactivity and the Civil Rights Act of 1991: An Opportunity for Reform*, 2 UTAH L. REV. 475, 479 (1993).

[4] CRA § 402(a) provides, "Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." 105 Stat. at 1099. This language has several possible meanings: (1) the CRA only applies to cases where the conduct occurred after its enactment; (2) the CRA applies to cases filed after its enactment; (3) the CRA applies to all cases tried and decided after its enactment; (4) the CRA applies to all cases pending upon its enactment. *See* Daniel Patrick Tokaji, *The Persistence of Prejudice: Process-Based Theory and the Retroactivity of the Civil Rights Act of 1991*, 103 YALE L.J. 567, 568 (1993).

[5] For cases in which preceding Supreme Court rulings govern pre-enactment conduct, see, e.g., Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1372, 1375, 61 Fair Empl. Prac. Cas. (BNA) 400, 401, 403 (11th Cir. 1992); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 900, 59 Fair Empl. Prac. Cas. (BNA) 1277, 1289 (D.C. Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929, 940, 58 Fair Empl. Prac. Cas. (BNA) 1201, 1210 (7th Cir. 1992); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378, 58 Fair Empl. Prac. Cas. (BNA) 786, 793 (8th Cir. 1992); Vogel v. City of Cincinnati, 959 F.2d 594, 597, 58 Fair Empl. Prac. Cas. (BNA) 402, 403 (6th Cir. 1992). For a case in which the CRA applies retroactively to pre-enactment conduct, see, e.g., Davis v. City & County of San Francisco, 976 F.2d 1536, 1550, 61 Fair Empl. Prac. Cas. (BNA) 440, 451 (9th Cir. 1992).

[6] *See* Estrin, *supra* note 3, at 2038.

In 1974, in *Bradley v. School Board of Richmond*, the United States Supreme Court held that a court must apply the law in effect at the time it renders its decision, unless doing so would result in either manifest injustice or contravention of specific statutory language or legislative history.[7] In *Bradley*, the plaintiffs sought attorney's fees for a successful school desegregation claim under a statute that became law while their case was pending on appeal.[8] The Supreme Court reasoned that in the absence of manifest injustice, its precedents provided a presumption in favor of applying statutes retroactively to cases pending prior to the law's enactment.[9] The Court thus identified three criteria for determining if application of the law in effect at the time of decision would create manifest injustice: (a) the nature and identity of the parties, (b) the nature of the parties' rights and (c) the nature of the impact of the change in law upon those rights.[10]

Considering the effect of these criteria in the case before it, the Supreme Court ruled it would not constitute a manifest injustice to apply a statute authorizing the award of attorney's fees to a case pending when the statute was passed.[11] First, the Court noted that in school desegregation cases, individuals acting as "private attorney[s] general" on behalf of a class of children routinely opposed publicly funded entities.[12] The Court reasoned that applying statutes to assist the former in their claim against the latter could hardly result in an injustice.[13] Second, according to the Court, the School Board had no vested right to the funds allocated to it by taxpayers to pay attorney's fees.[14] Finally, the Court reasoned, the statute's application did not pose an additional or unforeseeable substantive change to the School

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[7] 416 U.S. 696, 711 (1974).

[8] *See id.* at 705, 709.

[9] *Id.* at 711, 716. First, the Court cited Chief Justice Marshall's conclusion in *United States v. Schooner Peggy* that if, subsequent to the judgment and before reaching the appellate level, a law intervenes and positively changes the rule that governs, the law must be obeyed, particularly if it involves matters of great national concerns. *See Bradley*, 416 U.S. at 711–12; *see also* United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 105–07, 110 (1801) (U.S. Treaty with France requiring return to France of vessels not yet definitely condemned applied to vessel whose status was on appeal when Treaty was signed). Second, the Supreme Court pointed to *Thorpe v. Housing Authority of City of Durham* as adopting a broad reading of *Schooner Peggy* by holding that even where an intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given that effect. *Bradley*, 416 U.S. at 714, 715–16; *see also Thorpe*, 393 U.S. 268, 281–82 (1969) (general rule is that appellate court must apply law in effect at time it renders its decision, with exceptions made only to prevent manifest injustice).

[10] *Bradley*, 416 U.S. at 717.

[11] *Id.* at 721.

[12] *Id.* at 718.

[13] *See id.*

[14] *Id.* at 720.

Board's obligations; it only increased the extent of damages for which they were liable.[15] The Court thus concluded that, applying existing law, the plaintiffs were entitled to attorney's fees under the statute passed while their case was pending on appeal.[16]

In 1988, however, in *Bowen v. Georgetown University Hospital*, the United States Supreme Court concluded that the law does not favor retroactivity; therefore, the Court would decline to construe congressional enactments and administrative rules to have retroactive effect unless their language specifically required this result.[17] In *Bowen*, a group of hospitals challenged the Secretary of Health and Human Services' authority in 1984 to promulgate limitations on Medicare reimbursements to health care providers for expenses incurred prior to 1984.[18] The Supreme Court reasoned that, in the absence of express authorization from Congress, courts should not construe a statute to permit an agency to adopt retroactive rules.[19] The Court therefore determined that because the language of the authorizing statute evidenced no such congressional intent, the Secretary had no authority to promulgate rules retroactively.[20] Thus, the *Bowen* Court concluded, where no clear congressional intent exists, a statute delegating authority to administrative agencies contains a presumption against its delegating authority to legislate retroactively.[21]

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[15] *Bradley*, 416 U.S. at 721.

[16] *Id.* at 724. *But see* Bennett v. New Jersey, 470 U.S. 632, 639 (1985) (*Bradley* not to be read as contradicting the principle that statutes affecting substantive rights and liabilities presumptively have only prospective effect).

[17] 488 U.S. 204, 208 (1988).

[18] *Id.* at 207.

[19] *See id.* at 213–14.

[20] *See id.* at 215–16. The Court reached this decision without mentioning *Bradley* or its presumption in favor of applying the law in effect at the time of a decision. *See* Neff, *supra* note 3, at 487–88.

[21] *See Bowen*, 488 U.S. at 208, 213–14; *see also* Kristine McAlister, Recent Developments, *Retroactive Application of the Civil Rights Act of 1991*, 45 VAND. L. REV. 1319, 1324–25 (1992). In 1990, in *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, the United States Supreme Court held that where Congress clearly expressed its intent to apply a statute prospectively, that intent should govern. 494 U.S. 827, 837–38 (1990). In *Bonjorno*, the plaintiff sought to use standards for calculating postjudgment interest under a statute that passed while the case was on appeal. *See id.* at 831–32. The Court reasoned that Congress intended the statute in question to apply prospectively. *See id.* at 838. In reaching that conclusion, however, the Court recognized an "apparent tension" between the standards referred to in *Bradley* (apply the law in effect at the time of decision) and *Bowen* (congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires it). *See id.* at 836, 837 (citing *Bradley*, 416 U.S. at 711 and *Bowen*, 488 U.S. at 208); *see also Bonjorno*, 494 U.S. at 841 (Scalia, J., concurring) (declaring *Bradley* and *Bowen* in irreconcilable contradiction and urging Court to endorse *Bowen* as consistent with age-old tradition of prospective lawmaking). The Court

In 1989, in *Patterson v. McLean Credit Union*, the United States Supreme Court, addressing the issue of racial discrimination in employment, held that 42 U.S.C. § 1981 prohibited discrimination only in the making and enforcement of contracts and did not prohibit racial discrimination in all elements of the contractual relationship.[22] *Patterson* involved a § 1981 suit by a black employee who claimed she was harassed, rejected for promotion and eventually discharged, all because of her race.[23] The Supreme Court reasoned that the plaintiff had no cause of action under § 1981 for any of the alleged racial harassment because it involved neither a refusal to make a contract nor an impairment of her ability to enforce contract rights.[24] Thus, the Court held that § 1981 provided a cause of action only in cases where the formation or enforcement of contracts had been obstructed on account of race.[25]

In 1991, Congress passed the CRA, section 101 of which amended § 1981 to prohibit racial discrimination in all aspects of the contractual relationship.[26] This extension in scope of § 1981 in effect overruled *Patterson*'s prior limitation of § 1981, which restricted § 1981 to prohibiting discrimination only in the formation and enforcement of contracts.[27] Like the rest of the CRA, however, section 101 did not

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declined, however, to address that tension where the facts of the case before it demonstrated clear congressional intent to apply the statute in question prospectively. *See Bonjorno*, 494 U.S. at 840.

[22] 491 U.S. 164, 176, 49 Fair Empl. Prac. Cas. (BNA) 1814, 1820 (1989). At the time of *Patterson*, § 1981 provided in relevant part: "All persons . . . shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." 42 U.S.C. § 1981 (1988), *amended by* Civil Rights Act of 1991 § 101, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

[23] 491 U.S. at 169, 49 Fair Empl. Prac. Cas. (BNA) at 1817.

[24] *Id.* at 179, 49 Fair Empl. Prac. Cas. (BNA) at 1821. The Court did state that a refusal to promote would be actionable under § 1981, but only if the promotion involved such a change as to include an opportunity to enter into a new contract with the employer. *Id.* at 185, 49 Fair Empl. Prac. Cas. (BNA) at 1824.

[25] *See id.* at 184, 49 Fair Empl. Prac. Cas. (BNA) at 1823. Prior to *Patterson*, the protections of § 1981 were believed to extend to all conduct occurring during the contractual relationship. *See, e.g.*, Runyon v. McCary, 427 U.S. 160, 168–69 (1976); Johnson v. Railway Express Agency, 421 U.S. 454, 459–60, 10 Fair Empl. Prac. Cas. (BNA) 817, 819 (1975).

[26] CRA § 101 provides in relevant part:

> Section 1977 of the Revised Statute (42 U.S.C. 1981) is amended—
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> . . . .
>
> (2) by adding at the end the following new subsections:
>
> "(b) For purposes of this section, the term 'make and enforce contracts' includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

105 Stat. at 1071.

[27] *See* Rivers v. Roadway Express, 114 S. Ct. 1510, 1515–16, 64 Fair Empl. Prac. Cas. (BNA) 842, 844–45 (1994).

clearly indicate whether its amendment to § 1981 applied to cases arising before the CRA's 1991 enactment.[28]

In 1994, in *Landgraf v. USI Film Products*, the United States Supreme Court addressed its prior decisions in *Bradley* and *Bowen* with respect to the CRA.[29] The Court held that where a statute would operate retroactively, a presumption exists that it cannot govern pre-enactment conduct absent clear congressional intent.[30] The plaintiff in *Landgraf* claimed she had been sexually harassed by a fellow employee and that such harassment led her to quit her job.[31] The plaintiff asserted that the expansion of relief available to victims of employment discrimination under CRA section 102 applied to her case, even though it was on appeal at the time of the CRA's passage.[32]

The Supreme Court reasoned that when a case implicates a federal statute enacted after the events in suit, a court must first determine whether Congress has expressly prescribed the statute's temporal reach.[33] With respect to the 1991 CRA, the Supreme Court emphasized the absence of specific retroactive language in the text of the statute itself.[34] Turning to the CRA's legislative history, the Court determined that legislators most likely agreed to disagree about whether and to what extent the CRA would apply to pre-enactment conduct.[35] Thus,

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[28] *See supra* note 4 and accompanying text. Thus, relying on the presumptions expressed in *Bradley* and/or *Bowen*, courts have differed over whether the CRA or *Patterson* governs the scope of § 1981 for cases and conduct arising prior to the CRA's passage. *Compare, e.g.*, Davis v. City & County of San Francisco, 976 F.2d 1536, 1551, 1558, 61 Fair Empl. Prac. Cas. (BNA) 440, 451–52 (9th Cir. 1992) (holding text of CRA generally applies retroactively because two sections that are specifically prospective imply rest of Act must apply retroactively); Baynes v. AT&T Technologies, Inc., 976 F.2d 1370, 1373, 61 Fair Empl. Prac. Cas. (BNA) 400, 401 (11th Cir. 1992) (holding CRA applies only prospectively under either *Bradley* or *Bowen* presumptions); Gersman v. Group Health Ass'n, Inc., 975 F.2d 886, 898–99, 59 Fair Empl. Prac. Cas. (BNA) 1277, 1287–88 (D.C. Cir. 1992) (holding CRA § 101 not applicable to conduct occurring before its enactment because of effect on substantive rights which *Bowen* presumption prohibits; *Bradley* rule controls where statute affects no substantive rights); Johnson v. Uncle Ben's, Inc., 965 F.2d 1363, 1373–74, 59 Fair Empl. Prac. Cas. (BNA) 483, 492 (5th Cir. 1992) (applying *Patterson* interpretation of § 1981 by adopting *Bowen* presumption that CRA § 101 amendment to § 1981 not applicable to cases pending on appeal prior to CRA's enactment); Fray v. Omaha World Herald Co., 960 F.2d 1370, 1378, 58 Fair Empl. Prac. Cas. (BNA) 786, 792–93 (8th Cir. 1992) (holding *Patterson* rule applicable given evidence in legislative history of CRA suggesting Congress intended CRA to apply prospectively).

[29] *See* 114 S. Ct. 1483, 1496, 64 Fair Empl. Prac. Cas. (BNA) 820, 828 (1994).

[30] *Id.* at 1505, 64 Fair Empl. Prac. Cas. (BNA) at 834–35.

[31] *Id.* at 1488, 64 Fair Empl. Prac. Cas. (BNA) at 822.

[32] *Id.*

[33] *Id.* at 1505, 64 Fair Empl. Prac. Cas. (BNA) at 834.

[34] *See Landgraf*, 114 S. Ct. at 1491–92, 1508, 64 Fair Empl. Prac. Cas. (BNA) at 825, 837. The text of the CRA's predecessor, the 1990 Civil Rights Act (which was vetoed by President Bush), had contained such clearly retroactive language. *Id.* at 1491–92, 64 Fair Empl. Prac. Cas. (BNA) at 825.

[35] *Id.* at 1496, 64 Fair Empl. Prac. Cas. (BNA) at 828.

the Supreme Court concluded, Congress did not indicate how the CRA would affect pre-enactment cases.[36]

The *Landgraf* Court further reasoned that in the absence of an expression of congressional intent, *Bradley* had not altered the well-established presumption that a statute should not apply where it would have a genuinely "retroactive effect."[37] The Court articulated its test for "retroactive effect" as an examination of whether the statute's provisions attached new legal consequences to events completed before its passage.[38] The Court recognized that not all statutes have a "retroactive effect" simply because they are applied to cases arising from pre-enactment conduct; some statutes could apply to pending cases without any shift in legal consequences.[39] Examining CRA section 102, however, the Supreme Court determined that its introduction of a right to monetary relief amounted to a new legal burden on defendant's conduct.[40] As a result, the Court concluded that the plaintiff could not rely on CRA section 102 for her 1986 claim of sexual harassment because the statute would operate retroactively if applied to pre-1991 conduct.[41] Thus, the Supreme Court in *Landgraf* decided that a general presumption

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[36] *See id.* at 1505, 64 Fair Empl. Prac. Cas. (BNA) at 835. Moreover, the Court rejected the argument that CRA § 402(b) and § 109(c), which were explicitly prospective, could create a negative inference that the rest of the CRA applied retroactively. *Id.* at 1494, 64 Fair Empl. Prac. Cas. (BNA) at 827.

[37] 114 S. Ct. at 1503, 64 Fair Empl. Prac. Cas. (BNA) at 833.

[38] *Id.* at 1499, 64 Fair Empl. Prac. Cas. (BNA) at 830–31. In developing this test, the Court relied on Justice Story's definition of a retroactive statute as one which takes away or impairs vested rights acquired under existing law, creates new obligations, imposes a new duty or attaches a new disability to past transactions. *Id.* at 1499, 64 Fair Empl. Prac. Cas. (BNA) at 830 (citing Society for the Promulgation of the Gospel v. Wheeler, 22 F. Cas. 756, 767 (C.C.D.N.H. 1814) (No. 13,156)).

[39] *See Landgraf*, 114 S. Ct. at 1499, 1501, 64 Fair Empl. Prac. Cas. (BNA) at 831, 832. The Court listed a number of statutes such as those regulating prospective relief, those conferring or ousting jurisdiction and those procedural rules that regulate secondary conduct as among the class of statutes that could be applied to cases pending prior to their enactment. *See id.* at 1501–02, 64 Fair Empl. Prac. Cas. (BNA) at 832–33. The Court went on to indicate, however, that the mere fact that a rule is procedural does not necessarily mean that it applies to every pending case. *Id.* at 1502 n.29, 64 Fair Empl. Prac. Cas. (BNA) at 833 n.29. Thus, the Court reasoned it did not restrict its presumption against statutory retroactivity to cases where vested rights were affected. *Id.* The Court concluded that the application of such procedural provisions will normally depend on the case. *Id.*

[40] *See Landgraf*, 114 S. Ct. at 1505, 1506, 64 Fair Empl. Prac. Cas. (BNA) at 835. The Court did not hold, however, that all sections of the CRA must be applied prospectively; it reasoned CRA sections need not be treated uniformly with respect to the issue of retroactivity. *See id.* at 1494, 1505, 64 Fair Empl. Prac. Cas. (BNA) at 827, 835. The Court then considered the retroactive effect for each of the provisions plaintiff claimed applicable, concluding in each case that application to cases arising prior to the passage of § 102 necessarily involved a retroactive effect. *See id.* at 1505–06, 64 Fair Empl. Prac. Cas. (BNA) at 835.

[41] *See id.* at 1506–07, 64 Fair Empl. Prac. Cas. (BNA) at 836.

against the "retroactive" application of a statute always exists in the absence of a clear statement by Congress to the contrary.[42]

During the *Survey* year, in *Rivers v. Roadway Express, Inc.*, the United States Supreme Court held that CRA section 101, which amended § 1981 to prohibit discrimination in all aspects of the contractual relationship, could not be applied to cases arising before the CRA's enactment in 1991.[43] The Court reasoned that the same principles articulated in *Landgraf*'s analysis of CRA section 102 applied to CRA section 101.[44] Moreover, the Supreme Court rejected an additional argument in *Rivers* that statutes with a restorative purpose could apply retroactively.[45] The Court determined that the fact that CRA section 101 had been enacted in response to *Patterson* did not supply sufficient evidence of a clear congressional intent to apply that section to cases pending before the CRA's enactment.[46] The Supreme Court also rejected the argument that, even without an expression of congressional intent, section 101 was the kind of restorative statute that presumptively applied to pending cases.[47] Finally, the Supreme Court concluded that although Congress can retroactively restore prior understandings of statutes it believes the Court to have misconstrued, the Court will not give statutes such effect unless Congress makes its intentions clearly apparent.[48]

The petitioners in *Rivers*, Maurice Rivers and Robert C. Davison, were African-American garage mechanics employed by Roadway Express, Inc. ("Roadway").[49] On the morning of August 22, 1986, a supervisor directed them to attend a disciplinary hearing later that day.[50] Rivers and Davison refused to go to the hearing because they had not received the notice required by their collective bargaining agreement.[51] The hearings resulted in a two-day suspension of both employees, who later filed grievances and won full backpay.[52] Shortly afterward, Roadway scheduled another disciplinary hearing for Rivers and Davison,

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[42] *See id.* at 1498, 64 Fair Empl. Prac. Cas. (BNA) at 830.

[43] 114 S. Ct. 1510, 1519–20, 64 Fair Empl. Prac. Cas. (BNA) 842, 848 (1994).

[44] *Id.* at 1514, 64 Fair Empl. Prac. Cas. (BNA) at 844.

[45] *See id.* at 1515, 1518, 64 Fair Empl. Prac. Cas. (BNA) at 844, 846–47.

[46] *Id.* at 1517, 64 Fair Empl. Prac. Cas. (BNA) at 846.

[47] *See id.* at 1517–18, 64 Fair Empl. Prac. Cas. (BNA) at 846–47.

[48] *See Rivers*, 114 S. Ct. at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[49] Harvis v. Roadway Express, 973 F.2d 490, 491, 61 Fair Empl. Prac. Cas. (BNA) 91, 91 (6th Cir. 1992), *aff'd sub nom.* Rivers v. Roadway Express, 114 S. Ct. 1510, 64 Fair Empl. Prac. Cas. (BNA) 842 (1994).

[50] *Id.* at 491–92, 61 Fair Empl. Prac. Cas. (BNA) at 91.

[51] *Rivers*, 114 S. Ct. at 1513, 64 Fair Empl. Prac. Cas. (BNA) at 843.

[52] *Id.*

which the employees also refused to attend, again on the grounds of improper notice.[53] Roadway discharged both Rivers and Davison on September 26, 1986, for refusing to attend the hearings and for their "accumulated work record."[54] On December 22, 1986, the employees filed a § 1981 complaint in the United States District Court for the Northern District of Ohio, alleging that they had been discharged from Roadway because of their race and for insisting on the same procedural protections afforded white employees.[55]

On June 15, 1989, prior to the trial, the United States Supreme Court announced in *Patterson* that § 1981 did not apply to conduct occurring after the formation of a contract that did not interfere with the right to enforce contractual obligations.[56] The district court, relying on *Patterson*, dismissed their claims, holding that § 1981 covered none of the employees' discriminatory discharge claims because they did not involve the formation or enforcement of a contract.[57] On appeal, Rivers and Davison argued that *Patterson* did not bar their complaint because they alleged that their discharge from Roadway occurred in response to their attempts to enforce the labor agreement, and thus fell under *Patterson*'s narrower reading of § 1981.[58] In the alternative, they contended that CRA section 101, which was enacted while their appeal was pending, should apply retroactively to their § 1981 claims, thereby invalidating the district court's decision.[59]

The United States Court of Appeals for the Sixth Circuit reversed the district court, holding that the employees' allegations stated a claim under § 1981.[60] The Sixth Circuit determined that the employees' allegations of retaliatory discharge for attempting to enforce a contractual right to receive equal notice fell within *Patterson*'s interpretation of § 1981 as a case of discrimination in the enforcement of contracts.[61] The court of appeals rejected, however, the employees' argument that CRA section 101 should be applied retroactively.[62] The court reasoned that it could not permit the application of section 101 to cases pending prior to the CRA's enactment because it would adversely affect the

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[53] *Id.*

[54] *Harvis*, 973 F.2d at 492, 61 Fair Empl. Prac. Cas. (BNA) at 92.

[55] *Rivers*, 114 S. Ct. at 1513, 64 Fair Empl. Prac. Cas. (BNA) at 843.

[56] *Id.* at 1513–14, 64 Fair Empl. Prac. Cas. (BNA) at 843 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 49 Fair Empl. Prac. Cas. (BNA) 1814 (1989)).

[57] *Id.* at 1514, 64 Fair Empl. Prac. Cas. (BNA) at 843.

[58] *Harvis*, 973 F.2d at 492, 61 Fair Empl. Prac. Cas. (BNA) at 92.

[59] *Id.*

[60] *Id.* at 493, 61 Fair Empl. Prac. Cas. (BNA) at 93.

[61] *Id.* at 493–94, 61 Fair Empl. Prac. Cas. (BNA) at 93.

[62] *Id.* at 497, 61 Fair Empl. Prac. Cas. (BNA) at 96.

defendant's substantive rights and liabilities.[63] The Sixth Circuit, therefore, concluded that § 1981 as interpreted by *Patterson*, not as amended by section 101, governed cases pending prior to the CRA's passage.[64]

The United States Supreme Court affirmed the Sixth Circuit's decision, holding that CRA section 101 did not apply to cases arising before its enactment.[65] The Court applied the congressional intent test outlined in *Landgraf* to determine that the CRA's text provided no indication that Congress intended the CRA to apply to pending cases.[66] The Court then concluded that, in the absence of an expression of congressional intent, the presumption against statutory retroactivity applied even more to CRA section 101 than it had to section 102; whereas the latter merely altered the extent of a defendant's potential monetary liability under Title VII, the former actually broadened the categories of conduct subject to § 1981 liability.[67] By expanding the conduct actionable under § 1981, the Court concluded that section 101 imposed new legal obligations that brought it within the class of laws that *Landgraf* cited as presumptively prospective.[68]

The Court also rejected the employees' argument that, because section 101 restored pre-*Patterson* understandings of § 1981, it should apply to pending cases.[69] The employees claimed that section 101 applied to their case for two reasons: first, Congress's evident purpose to restore pre-*Patterson* law also indicated its affirmative intention that CRA section 101 apply to pre-enactment cases; and second, a general presumption exists in favor of applying restorative statutes to cases arising before their passage.[70] The Court disagreed, concluding that neither the CRA's text nor its legislative history revealed any congres-

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[63] *See Harvis*, 973 F.2d at 497, 61 Fair Empl. Prac. Cas. (BNA) at 95–96.

[64] *Rivers*, 114 S. Ct. at 1514, 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 844, 848 (1994).

[65] *Id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[66] *See id.* at 1516–17, 64 Fair Empl. Prac. Cas. (BNA) at 845–46; *see also supra* notes 33–36 and accompanying text.

[67] *Rivers*, 114 S. Ct. at 1514–15, 64 Fair Empl. Prac. Cas. (BNA) at 844; *see also* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1508, 64 Fair Empl. Prac. Cas. (BNA) 820, 836 (1994). Note, however, that in concluding Section II, the *Rivers* Court writes, "In short, *§ 102* has the effect not only of increasing liability but also of establishing a new standard of conduct." 114 S. Ct. at 1515, 64 Fair Empl. Prac. Cas. (BNA) at 844 (emphasis added). This statement does not mesh with the Court's conclusion in the preceding paragraph that § 102 did not alter the normative scope of Title VII's prohibition on workplace discrimination. *See id.* Therefore, given the Court's preceding analysis of the distinctions between CRA § 101 and § 102, it would appear that for the sentence to make sense it should read, ". . . *§ 101* has the effect not only of increasing liability, but also of establishing a new standard of conduct."

[68] *See Rivers*, 114 S. Ct. at 1514–15, 64 Fair Empl. Prac. Cas. (BNA) at 844.

[69] *Id.* at 1517, 1518, 64 Fair Empl. Prac. Cas. (BNA) at 846, 847.

[70] *Id.* at 1515, 64 Fair Empl. Prac. Cas. (BNA) at 844.

sional intention to restore retroactively pre-*Patterson* understandings of § 1981.[71] The Court reasoned that Congress's decision to alter a rule of law does not by itself reveal whether Congress also intended to apply that law retroactively to events that would otherwise be governed by a judicial decision.[72] Even assuming that Congress disapproved of *Patterson* and wanted section 101 to apply retroactively, moreover, the Court still found no evidence in the 1991 CRA that indicated a clear expression of congressional intent to reach cases that arose before its enactment.[73] The Court concluded, therefore, that the mere fact Congress passed section 101 in response to *Patterson* failed to demonstrate a clear expression of congressional intent to overcome the presumption against statutory retroactivity.[74]

The Court dismissed the employees' contention that Congress need not express its intent because section 101 is the kind of restorative statute that presumptively applies to pending cases.[75] The Court reasoned that its decisions recognized no such presumption in favor of a retroactive application of restorative statutes, except in certain narrow, error-correcting cases.[76] Thus, despite the equitable appeal of the employees' argument that section 101's pre-*Patterson* understanding of § 1981 should govern, the Supreme Court concluded that section 101

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[71] *Id.* at 1517, 64 Fair Empl. Prac. Cas. (BNA) at 846.

[72] *Id.* at 1515, 64 Fair Empl. Prac. Cas. (BNA) at 844–45.

[73] *Rivers*, 114 S. Ct. at 1516, 64 Fair Empl. Prac. Cas. (BNA) at 845. The Court compared the silence of the 1991 CRA with the vetoed 1990 Civil Rights Act, whose text and legislative history quite clearly revealed an intention to apply a pre-*Patterson* understanding of § 1981 to cases arising prior to its enactment. *See id.* at 1516–17, 64 Fair Empl. Prac. Cas. (BNA) at 845–46 (noting that 1991 CRA never refers to *Patterson*, that it only expands scope of relevant statutes, and that evidence in 1991 legislative history suggests legislators failed to agree on question of retroactive application).

[74] *Id.* at 1517, 64 Fair Empl. Prac. Cas. (BNA) at 846.

[75] *Id.* at 1517–18, 64 Fair Empl. Prac. Cas. (BNA) at 846–47.

[76] *See id.* at 1518, 64 Fair Empl. Prac. Cas. (BNA) at 847. The Court distinguished *Frisbie v. Whitney* (where a congressional statute did restore prior rights) because in that case Congress had clearly expressed its intent to apply the statute retroactively, leaving open only the question of its power to do so. *Rivers*, 114 S. Ct. at 1518, 64 Fair Empl. Prac. Cas. (BNA) at 847 (citing Frisbie v. Whitney, 76 U.S. (9 Wall.) 187, 192 (1870)); *see also Frisbie*, 76 U.S. (9 Wall.) at 192 (rights of land occupants deprived of ownership when treaties granting that ownership were voided could be restored by subsequent congressional statute). The Court also distinguished *Freeborn v. Smith*, a case which, unlike § 101, involved an error-correcting statute that would have been meaningless had it not been read to apply to pending cases. *Rivers*, 114 S. Ct. at 1518, 64 Fair Empl. Prac. Cas. (BNA) at 847 (citing Freeborn v. Smith, 69 U.S. (2 Wall.) 160, 173–75 (1865)); *see also Freeborn*, 69 U.S. (2 Wall.) at 173–75 (statute admitting Nevada to Union that failed to provide for jurisdiction over pending Nevada cases could be corrected by a subsequent statute). The *Rivers* Court reasoned that § 101 was simply not the type of statute that would lack an effect if not applied to pending cases. *See* 114 S. Ct. at 1518, 64 Fair. Empl. Prac. Cas. (BNA) at 847.

still fell within the general class of statutes that are presumptively prospective.[77]

Finally, the *Rivers* Court observed that its decision adhered to the general principle that statutes operate only prospectively, while judicial decisions operate retrospectively.[78] Given the hierarchical nature of the federal court system, the Supreme Court reasoned that its decision in *Patterson* constituted the authoritative interpretation of § 1981 and its phrase "to make and enforce contracts," until Congress amended this section with CRA section 101.[79] The Court ruled, therefore, that because of the standards set by *Patterson*, the application of CRA section 101 to conduct arising before its enactment would create liabilities that had no legal existence before the CRA's passage.[80] As such, the Supreme Court concluded that, without a clear expression of congressional intent, section 101 could not apply to pre-enactment conduct because it would violate the standing presumption against giving statutes retroactive effect.[81]

In an opinion concurring with the Court's judgments in both *Rivers* and *Landgraf*, Justice Scalia, joined by Justices Kennedy and Thomas, agreed with the majority's holding, but disagreed with the use of the CRA's legislative history to search for a clear statement of congressional intent.[82] Justice Scalia proposed that a statute's text alone should determine whether Congress intends a statute to apply retroactively.[83] Justice Scalia also opposed the Court's deference to *Bradley*, which he believed invented "an utterly new and erroneous" presumption favoring the retroactive application of new statutes.[84] Finally, Jus-

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[77] *See Rivers*, 114 S. Ct. at 1517–18, 64 Fair Empl. Prac. Cas. (BNA) at 846–47.

[78] *Id.* at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 847.

[79] *See id.* at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 848. The Court pointed out that when it construes a statute, it decides what that statute has meant continuously since the date when it became law. *Id.* at 1519 n.12, 64 Fair Empl. Prac. Cas. (BNA) at 848 n.12. Thus, *Patterson* did not change the law established by the courts of appeal, but rather stated what § 1981 had always meant and why the courts of appeal had misinterpreted congressional intentions. *See id.*

[80] *Id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[81] *See id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848; *see also supra* note 38 and accompanying text (defining retroactivity).

[82] *Rivers*, 114 S. Ct. at 1522, 64 Fair Empl. Prac. Cas. (BNA) at 848 (Scalia, J., concurring in judgment). The newest member of the Court, Justice Stephen Breyer, has also urged caution in relying on legislative history for statutory analysis. *See generally* Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

[83] *Rivers*, 114 S. Ct. at 1522, 64 Fair Empl. Prac. Cas. (BNA) at 848 (Scalia, J., concurring in judgment).

[84] *Id.* at 1523, 64 Fair Empl. Prac. Cas. (BNA) at 849 (Scalia, J., concurring in judgment) (arguing that holding in *Bradley* had no basis in precedent); *see also* Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 840–59 (1990) (Scalia, J., concurring) (arguing that the *Bradley* rule is wrong, and tracing line of precedents favoring presumption against statutory retroactivity).

tice Scalia criticized the majority's definition of retroactivity because it relied on a substance/procedure distinction that, he contended, required too many arbitrary exceptions.[85] In place of that definition, Justice Scalia suggested that, absent a clear congressional statement to the contrary, the Court should never give statutes a retroactive effect, the definition of retroactive being determined by the actual event that a statute purports to regulate.[86]

In dissent, Justice Blackmun argued that the Court, in its rush to resolve tensions between *Bradley* and *Bowen*, rejected the most natural reading of CRA section 101: that it applied to cases pending on appeal on the date of the CRA's passage.[87] Justice Blackmun also asserted that because this case arose under the broader, pre-*Patterson* interpretation of § 1981, it would not violate the parties' expectations or vested rights to apply these same standards now recognized again under section 101.[88] Justice Blackmun reasoned that if a new law such as section 101 does not disturb the parties' vested rights or settled expectations, it should apply to cases pending on that statute's enactment date.[89]

After *Rivers*, the narrow reading of § 1981 established in *Patterson* will govern all conduct occurring prior to the CRA's enactment, while CRA section 101 will control all conduct occurring after that date.[90] Although *Landgraf* properly held that the CRA's damage remedies would have a retroactive effect if applied to pre-enactment cases be-

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[85] *See Rivers*, 114 S. Ct. at 1524, 64 Fair Empl. Prac. Cas. (BNA) at 849–50 (Scalia, J., concurring in judgment). In particular, Justice Scalia contended that the exceptions the majority made for not applying a procedural rule retroactively (*e.g.*, statutes regulating filing of complaints would not govern complaints already filed, new jury trial rule would not warrant retrial) make no sense under the majority's definition of retroactivity because that definition is fundamentally flawed. *See id.* (Scalia, J., concurring in judgment).

[86] *Id.* (Scalia, J., concurring in judgment). Thus, although most statutes regulate primary conduct and hence will not be applied to trials involving pre-enactment conduct, Justice Scalia reasoned, other statutes have different purposes and therefore regulate a different retroactivity event. *See id.* at 1524–25, 64 Fair Empl. Prac. Cas. (BNA) at 850 (Scalia, J., concurring in judgment). For example, Justice Scalia noted that a new rule of evidence governing expert testimony seeks to regulate the conduct of trial and the event relevant to the retroactivity of the rule is the introduction of testimony. *See id.* at 1525, 64 Fair Empl. Prac. Cas. (BNA) at 850 (Scalia, J., concurring in judgment). Thus, the rule will apply only to testimony in trials after the effective date of the new rule. *Id.* at 1525, 64 Fair Empl. Prac. Cas. (BNA) at 850 (Scalia, J., concurring in judgment).

[87] *See id.* at 1520, 64 Fair Empl. Prac. Cas. (BNA) at 851 (Blackmun, J., dissenting); *see also* Landgraf v. USI Film Prods., 114 S. Ct. 1483, 1508–09, 64 Fair Empl. Prac. Cas. (BNA) 820, 840–41 (1994) (Blackmun, J., dissenting) (arguing that presumption of retroactivity may be negatively inferred from specifically prospective provisions of CRA § 402(b) and § 109(c)).

[88] *See Rivers*, 114 S. Ct. at 1520, 64 Fair Empl. Prac. Cas. (BNA) at 851–52 (Blackmun, J., dissenting).

[89] *See id.* at 1521–22, 64 Fair Empl. Prac. Cas. (BNA) at 852–53 (Blackmun, J., dissenting).

[90] *See id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

cause of the new legal obligations it imposed on defendants, the decision in *Rivers* is more troubling. Even the Supreme Court recognized that section 101 was a restorative statute, restoring to parties like Maurice Rivers the rights they thought they had when the conduct occurred.[91] Relying on the structure of the federal court system, however, the Supreme Court refused to give effect to those prior understandings because its own decision in *Patterson* did apply retroactively.[92] The Court thus subjugated concerns with fairness and equity to consistency in applying its established presumptions in favor of retroactivity for judicial decisions and against retroactivity for statutes.[93] The Supreme Court, therefore, refused to create an exception to its new test for retroactive effect, leaving § 1981 plaintiffs like those in *Rivers* with a more limited cause of action for conduct occurring anytime prior to 1991.[94]

Beyond the scope of § 1981 cases, however, *Rivers*, in conjunction with *Landgraf*, does much to resolve the confusion surrounding what test a court should apply when a case implicates a statute enacted after the violative conduct has occurred. The Supreme Court has now established that courts must look first to the statute's text and legislative history to determine whether Congress clearly intended the act to apply in cases pending or conduct occurring prior to its enactment.[95] If congressional intent is clear, it governs the statute's temporal application.[96] Absent clear statements by Congress, the Court will hold to a presumption *against* giving a statute retroactive effect; thus, *Bowen* has become the general default rule.[97] The Court in *Rivers* and *Landgraf* did not overturn *Bradley*, however, but rather limited it to cases where a statute would not have a "retroactive effect" if applied to pre-enactment conduct.[98] The result is a much clearer test for assessing the temporal application of statutes where evidence of congressional intent is absent.

The key question left unresolved by *Rivers* and *Landgraf* is how will courts define "retroactive effect" in the future. The Court's substance/procedure definition of retroactivity (i.e., where laws creating

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[91] *See id.* at 1517–18, 64 Fair Empl. Prac. Cas. (BNA) at 846–47.

[92] *See id.* at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 847–48.

[93] *See Rivers*, 114 S. Ct. at 1518, 1519, 64 Fair Empl. Prac. Cas. (BNA) at 846, 847.

[94] *See id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[95] *See Landgraf*, 114 S. Ct. at 1505, 64 Fair Empl. Prac. Cas. (BNA) at 834.

[96] *See, e.g., Rivers*, 114 S. Ct. at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 848; Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 837 (1990).

[97] *See Rivers*, 114 S. Ct. at 1514–15, 64 Fair Empl. Prac. Cas. (BNA) at 844.

[98] *See id.*; *see also Landgraf*, 114 S. Ct. at 1501, 1503, 64 Fair Empl. Prac. Cas. (BNA) at 832, 833.

new legal burdens will become presumptively prospective, whereas procedural rules and other laws not creating substantive rights will be applied to all cases after enactment) seems to require exceptions that Justice Scalia urges would be unnecessary if his test (i.e., searching for the relevant event that the statute purports to regulate) were applied.[99] Regardless of which definition of retroactivity courts use, however, the use of a single test will lead to much more consistent decisions than those guided by the opposite presumptions under the rules of *Bradley* and *Bowen*.[100]

By establishing a general presumption against statutory retroactivity, therefore, the Supreme Court's rulings in *Rivers* and *Landgraf* will make it far easier for future plaintiffs and defendants to predict how a new statute will affect pre-enactment conduct. Moreover, the Court has shifted the burden onto Congress to establish whether a statute should apply to pending cases or pre-enactment conduct. *Landgraf* and *Rivers* have put Congress on notice that if it cannot agree to include provisions giving a statute retroactive effect, the Court will not apply new statutes affecting substantive rights retroactively.[101]

In conclusion, *Rivers v. Roadway Express* establishes that the interpretation of § 1981 set forth in CRA section 101 does not apply to cases arising before its enactment. In such cases the narrower reading of § 1981 established by *Patterson* continues to control.[102] This result represents an application of the Court's newly clarified presumption, developed in *Landgraf*, against giving statutes retroactive effect.[103] The decision will deprive many plaintiffs alleging pre-*Patterson* discrimination under § 1981 of their causes of action even though the claims appeared valid at the time the conduct occurred.[104] At the same time, after *Rivers*, a general presumption exists against giving statutes retroactive effect, which will make it easier for plaintiffs, defendants and Congress to assess an enacted statute's temporal effects.[105] Only a clear expression of legislative intent by Congress can now give a statute such retroactive effect.[106]

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[99] *See Rivers*, 114 S. Ct. at 1524, 64 Fair Empl. Prac. Cas. (BNA) at 850 (Scalia, J., concurring in judgment); *Landgraf*, 114 S. Ct. at 1499, 1501, 64 Fair Empl. Prac. Cas. (BNA) at 830–31, 832.

[100] *See* Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Bradley v. School Bd. of Richmond, 416 U.S. 696, 711 (1974).

[101] *See, e.g.*, *Rivers*, 114 S. Ct. at 1514–15, 64 Fair Empl. Prac. Cas. (BNA) at 844; *Landgraf*, 114 S. Ct. at 1503, 1505, 64 Fair Empl. Prac. Cas. (BNA) at 833, 834.

[102] *See Rivers*, 114 S. Ct. at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[103] *See id.* at 1514–15, 64 Fair Empl. Prac. Cas. (BNA) at 844.

[104] *See id.* at 1517–18, 64 Fair Empl. Prac. Cas. (BNA) at 846.

[105] *See id.* at 1519–20, 64 Fair Empl. Prac. Cas. (BNA) at 848.

[106] *See id.* at 1519, 64 Fair Empl. Prac. Cas. (BNA) at 848.

II. After-Acquired Evidence Doctrine

A. *Appropriateness of Summary Judgment for Employer in Action Brought Under ADEA Based on After-Acquired Evidence of Employee's Misconduct:* McKennon v. Nashville Banner Publishing Co.[1]

The Age Discrimination in Employment Act of 1967 ("ADEA") makes it unlawful for an employer to discriminate against any employee or potential employee on the basis of age.[2] The statute aims to promote employment of older persons based on their ability rather than age and to prohibit arbitrary age discrimination in the workplace.[3] In evaluating claims of discrimination under the ADEA and similar statutes, courts have recently struggled to determine the proper role that after-acquired evidence should play in such lawsuits.[4]

After-acquired evidence in an employment discrimination case consists of evidence of the plaintiff's application fraud or job misconduct that the employer discovered subsequent to the alleged discrimination.[5] The United States circuit courts' treatment of after-acquired evidence in employment discrimination cases has differed.[6] By the end of the *Survey* year, the Supreme Court had not ruled on the appropriate role of after-acquired evidence in employment discrimination liti-

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[1] 9 F.3d 539, 63 Fair Empl. Prac. Cas. (BNA) 355 (6th Cir. 1993), *rev'd*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

[2] 29 U.S.C. § 623 (a) (1) (1988). The pertinent language of § 623 (a) is: "It shall be unlawful for an employer–(1) to fail or to refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . ." *Id.*

[3] 29 U.S.C. § 621(b) (1988).

[4] *See, e.g.*, Mardell v. Harleysville Life Ins. Co., No. 93-3258, 1994 WL 396512 (3d Cir. Aug. 2, 1994); Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 59 Fair Empl. Prac. Cas. (BNA) 1249 (6th Cir. 1992); Wallace v. Dunn Constr. Co., 968 F.2d 1174, 59 Fair Empl. Prac. Cas. (BNA) 997 (11th Cir. 1992); Summers v. State Farm Mut. Auto. Ins. Co., 864 F.2d 700, 48 Fair Empl. Prac. Cas. (BNA) 1107 (10th Cir. 1988).

[5] *See, e.g.*, *Mardell*, 1994 WL 396512, at *1. Such evidence is routinely discovered during the employee's deposition. *E.g.*, *McKennon*, 9 F.3d at 540, 63 Fair Empl. Prac Cas. (BNA) at 355.

[6] *Compare Summers*, 864 F.2d at 708, 48 Fair Empl. Prac. Cas. (BNA) at 1113 (after-acquired evidence of employee misconduct for which employee would have been fired had employer known of it was relevant to employee's claim of injury and precluded grant of any relief) *and Milligan-Jensen*, 975 F.2d at 305, 59 Fair Empl. Prac. Cas. (BNA) at 1251 (after-acquired evidence of employee's application fraud which would have resulted in employee not having been hired precluded employee from obtaining any relief) *with Mardell*, 1994 WL 396512, at *12 (after-acquired evidence may not be considered at liability stage of employment discrimination suit, yet is relevant and admissible at remedies stage) *and Wallace*, 968 F.2d at 1181, 59 Fair Empl. Prac. Cas. (BNA) at 1002–03 (after-acquired evidence does not operate as bar to employer's liability, yet may be considered when determining appropriate remedies).

gation; shortly thereafter, however, the Court resolved the conflict among the circuits in *McKennon v. Nashville Banner Publishing Co.*[7]

In 1988, in *Summers v. State Farm Mutual Automobile Insurance Co.*, the United States Court of Appeals for the Tenth Circuit delivered the decision responsible for showcasing the issue of after-acquired evidence.[8] The Tenth Circuit held that courts should award summary judgment to an employer charged with discrimination if the employer can prove that after-acquired evidence of the employee's misconduct would have resulted in the employee's termination, had the employer discovered the misconduct.[9] The court held that summary judgment for the employer was appropriate even though the after-acquired evidence was not the actual cause for the discharge.[10] In *Summers*, a fifty-six year old Mormon insurance claims adjuster brought suit against his employer for both age and religious discrimination.[11] Four years after the alleged discrimination, while preparing for trial, the employer discovered over 150 instances where the employee had falsified company records.[12] The employer moved for summary judgment contending that, had the employer been aware of this misconduct at the time, it would have terminated the employee immediately.[13] The Tenth Circuit reasoned that the plaintiff had suffered no "injury" as a result of the termination because he would have been legitimately fired had his employer known of the misconduct at the time of its occurrence.[14] Accordingly, the circuit court affirmed the district court's award of summary judgment to the employer.[15] Although the court stated that

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[7] No. 93–1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

[8] 864 F.2d at 700, 48 Fair Empl. Prac. Cas. (BNA) at 1107.

[9] *Id.* at 708, 48 Fair Empl. Prac. Cas. (BNA) at 1113.

[10] *Id.*

[11] *Id.* at 702, 48 Fair Empl. Prac. Cas. (BNA) at 1107. Summers brought his age discrimination claim under 29 U.S.C. §§ 621–634 (1988), and brought his religious discrimination claim under 42 U.S.C. § 2000e-2(a) and 3(a) (1988). *Summers*, 864 F.2d at 702, 48 Fair Empl. Prac. Cas. (BNA) at 1108.

[12] *Summers*, 864 F.2d at 703, 48 Fair Empl. Prac. Cas. (BNA) at 1108. During the course of Summers' employment, the employer did learn that he had falsified some company records, and warned Summers not to repeat that misconduct. *Id.* at 702, 48 Fair Empl. Prac. Cas. (BNA) at 1108. It was not until after the discharge, however, that State Farm learned the extent of Summers' falsifications, and that he had continued to falsify records even after receiving a warning from company officials. *Id.* at 703, 48 Fair Empl. Prac. Cas. (BNA) at 1108.

[13] *Id.* at 703, 48 Fair Empl. Prac. Cas. (BNA) at 1109.

[14] *Id.* at 708–09, 48 Fair Empl. Prac. Cas. (BNA) at 1113.

[15] *Id.*, 48 Fair Empl. Prac. Cas. (BNA) at 1113. In reaching this conclusion, the Tenth Circuit referred to the Supreme Court's reasoning in cases where an employer terminated an employee for both legitimate and unlawful motives. *Id.* at 705–06, 48 Fair Empl. Prac. Cas. (BNA) at 1110–11. In Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274, 284 (1977), the Court held that the employee cannot prevail in such "mixed motive" cases if the legitimate motive alone would have sufficed to justify the employee's dismissal.

In addition to its reference to *Mt. Healthy*, the Tenth Circuit analogized the *Summers* case

the after-acquired evidence acted to preclude a grant of relief for alleged discrimination, the rule enunciated by the Tenth Circuit in *Summers* effectively results in such evidence operating as a complete defense to employer liability in discrimination cases.[16]

In 1992, in *Wallace v. Dunn Construction Co.*, the United States Court of Appeals for the Eleventh Circuit adopted a different approach to after-acquired evidence, holding that such evidence was only relevant with respect to determining the appropriate remedies available to a plaintiff who had already prevailed in a trial on the merits of an employment discrimination claim.[17] In *Wallace*, the plaintiff brought actions under the Fair Labor Standards Act of 1938 and Title VII of the Civil Rights Act of 1964.[18] During the discovery process, the employer learned that the employee had lied on her employment application in response to a question concerning past criminal convictions.[19] Armed with this new evidence, the employer moved for partial summary judgment on the wrongful discharge claim under the *Summers* rule.[20]

While granting partial summary judgment to the employer with respect to the plaintiff's claims for reinstatement, front pay and an injunction, the Eleventh Circuit refused to consider such evidence as a complete defense to liability, ruling that to do so would inappropri-

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to a hypothetical involving a "masquerading company doctor." *Summers*, 864 F.2d at 708, 48 Fair Empl. Prac. Cas. (BNA) at 1113. If a company doctor is fired on the basis of his age, race, religion and sex, and the company, in defending a civil rights action, subsequently discovers that the discharged employee was not a "doctor," the court concluded that the masquerading employee would not be entitled to relief, and the employee in *Summers*, in the view of the Tenth Circuit, was in no better a position. *Id.* This hypothetical has been oft-repeated by other courts applying the Tenth Circuit's approach in *Summers*. *See, e.g.*, Milligan-Jensen v. Michigan Technological Univ., 975 F.2d 302, 304, 59 Fair Empl. Prac. Cas. (BNA) 1249, 1250 (6th Cir. 1992); Johnson v. Honeywell Info. Sys., Inc., 955 F.2d 409, 415, 57 Fair Empl. Prac. Cas. (BNA) 1363, 1367 (6th Cir. 1992).

[16] *See Summers*, 864 F.2d at 708, 48 Fair Empl. Prac. Cas. (BNA) at 1113. The Tenth Circuit's holding in *Summers* has been described as the "complete defense" approach to the after-acquired evidence doctrine due to the fact that, if after-acquired evidence is presented to the court and there is no credible dispute as to whether the employer would not have hired or would have fired the employee on the basis of such evidence, the issues of liability and whether or not the employer actually engaged in unlawful discrimination become irrelevant—the employer must be awarded summary judgment. *Id.*; *see also* Mardell v. Harleysville Life Ins., 93-3258, 1994 WL 396512, at *4 (3d Cir. Aug. 2, 1994).

[17] Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1181, 59 Fair Empl. Prac. Cas. (BNA) 997, 1003 (11th Cir. 1992).

[18] *Id.* at 1176, 59 Fair Empl. Prac. Cas. (BNA) at 999. The Fair Labor Standards Act claims were brought under 29 U.S.C. §§ 206(d)(1), 215(a)(2) and 215(a)(3), and the Title VII claims were brought under 42 U.S.C. §§ 2000e-2(a)(1) and 2000e-3 (a). *Id.*

[19] *Wallace*, 968 F.2d at 1176–77, 59 Fair Empl. Prac. Cas. (BNA) at 999. Specifically, the employee indicated to the employer that she had no prior criminal convictions, when in fact she had been previously convicted for possession of cocaine and marijuana. *Id.*

[20] *Id.* at 1177–78, 59 Fair Empl. Prac. Cas. (BNA) at 999–1000.

ately ignore the lapse of time between the employment decision and the discovery of a legitimate motive for that decision.[21] The Eleventh Circuit also expressed concern that the *Summers* rule might invite employers to expend less effort in preventing discrimination, in that they may escape liability altogether through the use of after-acquired evidence of the employee's misdeeds.[22] In *Wallace*, then, the Eleventh Circuit ruled that although after-acquired evidence is relevant to the determination of relief due a successful plaintiff, it does not provide an affirmative defense to liability for employment discrimination.[23]

Similarly, in August of 1994, in *Mardell v. Harleysville Life Insurance Co.*, the United States Court of Appeals for the Third Circuit joined the Eleventh Circuit in rejecting the *Summers* rule, holding that courts should consider after-acquired evidence only at the later stage of an employment discrimination suit when they determine remedies (the "remedies stage").[24] The plaintiff in *Mardell* alleged both age and gender discrimination in a suit where the employer learned during the discovery process that the employee had made several misrepresentations on her resume and job application concerning her education and past experience.[25] Due to these misrepresentations, the trial court concluded that the employee had suffered no legally cognizable injury and granted summary judgment to the employee on the basis of this after-acquired evidence.[26] In addition to the evidence of the employee's misrepresentations, the court based its decision on an affidavit from the individual who hired the plaintiff stating that he relied on the employee's resume and application and that, had he known of the misrepresentations, he would not have hired her.[27] Lastly, the court noted testimony from the plaintiff's supervisor indicating that he would have fired her had he learned of her misrepresentations during her employment.[28]

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[21] *Id.* at 1181, 59 Fair Empl. Prac. Cas. (BNA) at 1002.

[22] *Id.* at 1180, 59 Fair Empl. Prac. Cas. (BNA) at 1002.

[23] *Id.* at 1181, 59 Fair Empl. Prac. Cas. (BNA) at 1002–03. Under the Eleventh Circuit's analysis, after-acquired evidence concerning misconduct for which the employee would have been terminated had the employer been aware of it operates as a matter of law to bar a successful plaintiff's claim for reinstatement, front pay or an injunction. *Id.* at 1184, 59 Fair Empl. Prac. Cas. (BNA) at 1005.

[24] No. 93-3258, 1994 WL 396512, at *1 (3d Cir. Aug. 2, 1994).

[25] *Id.* at *2. Specifically, the employee had (1) claimed to possess a university degree when in fact she had not completed all of the required coursework, and (2) exaggerated duties, terms and periods of employment associated with her prior work history. *Id.* at *2–3.

[26] *Id.* at *3.

[27] *Id.*

[28] *Id.*

The Third Circuit reversed the district court's order of summary judgment, reasoning that the sole question to be answered at the initial stage of a trial determining liability (the "liability stage") in an ADEA or Title VII action is whether the employer discriminated against the employee on the basis of an impermissible factor at the instant of the adverse employment action.[29] The Third Circuit also held, however, that after-acquired evidence of application fraud or job misconduct is relevant to at least some issues at the remedies stage, and is, therefore, admissible at that point.[30]

Conversely, in 1992, in *Johnson v. Honeywell Information Systems, Inc.*, the United States Court of Appeals for the Sixth Circuit, interpreting Michigan law, held that in employment discrimination cases in which resume fraud is discovered after discharge, summary judgment for the employer is appropriate when the misrepresentation or omission was material, directly related to measuring the candidate for employment, and when the employer relied upon the information in making the hiring decision.[31] In *Johnson*, a field relations manager brought suit for wrongful discharge and illegal retaliatory termination under a state civil rights statute.[32] During the course of discovery, the employer learned that the employee had falsified her employment application in several respects, including exaggerations of both her formal education and past employment.[33] The employer moved for

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[29] *Mardell*, 1994 WL 396512, at *1, *5. The Third Circuit repeated the concern of the Eleventh Circuit that the *Summers* rule ignores the time lapse between the employer's action and the discovery of a legitimate motive for that action. *Id.* at *5.

[30] *Id.* at *11–12. The Third Circuit expressed caution that, in considering after-acquired evidence during the remedies stage of a trial, courts should exercise care to ensure that such evidence does not affect the liability verdict. *Id.* at *12.

[31] 955 F.2d 409, 414, 57 Fair Empl. Prac. Cas. (BNA) 1363, 1365 (6th Cir. 1992). The Sixth Circuit has stated that these three requirements must be satisfied in order for the after-acquired evidence doctrine to be applied in resume and application fraud cases; the misrepresentation or omission must be (1) material, (2) directly related to measuring the candidate for employment, and (3) a factor which was relied upon by the employer in making the hiring decision. *Id.* These requirements were an attempt by the court to ensure that employers would not simply comb through a discharged employee's record for evidence of trivial misrepresentations in an effort to avoid liability for an otherwise unlawful discharge. *Id.*

[32] *Johnson*, 955 F.2d at 411, 57 Fair Empl. Prac. Cas. (BNA) at 1363.

[33] *Id.* at 411–12, 57 Fair Empl. Prac. Cas. (BNA) at 1363–64. Specifically, the employee claimed on her application form to have earned a college degree from a particular university, while in fact she completed only four courses there. *Id.* Additionally, she claimed to have studied at a second university, when in fact that university had no record of her enrollment. *Id.* Lastly, the employee claimed to have been managing properties that she owned immediately prior to her employment with the defendant, when in fact she owned no such properties, and had been unemployed immediately prior to her hiring by the defendant. *Id.*

summary judgment arguing that the misrepresentations provided a complete defense to liability.[34]

On the basis of Michigan appeals court precedent, the Sixth Circuit concluded that the Michigan Supreme Court would admit evidence of employee misconduct occurring prior to termination as substantive evidence during the liability stage.[35] Such evidence, the court concluded, could give rise to just cause for termination even if the former employer did not become aware of the misconduct until after the discharge.[36] Citing *Summers*, the Sixth Circuit reasoned that if after-acquired evidence concerned material misrepresentations upon which the employer relied in its hiring decision, then the evidence established "valid and legitimate" reasons for termination, and courts should grant summary judgment for the employer.[37] Because the employer established that it would not have hired the employee and would have fired her had it been aware of the misrepresentations, the court held that the employee deserved no relief, even if the employee could prove that the employer was guilty of unlawful conduct.[38]

In another 1992 decision, *Milligan-Jensen v. Michigan Technological University*, the United States Court of Appeals for the Sixth Circuit reiterated its commitment to the *Summers* rule by holding that an employee who made material misrepresentations on her employment application was not entitled to damages on her claims of sex discrimination and unlawful retaliatory termination.[39] Despite the trial court's determination that the employer had in fact engaged in unlawful discrimination, the Sixth Circuit held that the plaintiff's misrepresentations barred her recovery as a matter of law.[40] In *Milligan-Jensen*, a security officer omitted a "Driving Under the Influence" conviction from her employment application.[41] The court reasoned that, because the employee would not have been hired, and would have been fired, if the employer had been aware of the falsification, the employee suffered no legally cognizable damage from the termination.[42] Conse-

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[34] *Id.* at 412, 57 Fair Empl. Prac. Cas. (BNA) at 1364.

[35] *Id.* at 413, 57 Fair Empl. Prac. Cas. (BNA) at 1365.

[36] *Id.* The Sixth Circuit relied on what was at the time an unpublished per curiam opinion of the Michigan Court of Appeals. *Id.*; *see* Bradley v. Philip Morris, Inc., 486 N.W.2d 48 (Mich. Ct. App. 1991). The court stated that its ruling was based on "common sense" as well. *Johnson*, 955 F.2d at 413, 57 Fair Empl. Prac. Cas. (BNA) at 1365.

[37] *Johnson*, 955 F.2d at 414, 57 Fair Empl. Prac. Cas. (BNA) at 1365.

[38] *Id.* at 415, 57 Fair Empl. Prac. Cas. (BNA) at 1367.

[39] 975 F.2d 302, 303, 305, 59 Fair Empl. Prac. Cas. (BNA) 1249, 1249, 1251 (6th Cir. 1992).

[40] *Id.*, 59 Fair Empl. Prac. Cas. (BNA) at 1251.

[41] *Id.* at 303, 59 Fair Empl. Prac. Cas. (BNA) at 1250.

[42] *Id.* at 304–05, 59 Fair Empl. Prac. Cas. (BNA) at 1251. The trial court found that, although

quently, the Sixth Circuit reversed the trial court's judgment for the employee, holding that because the employee materially falsified her application, she had suffered no damage as a result of the discrimination and unlawful termination, and therefore had no legitimate claim to relief.[43]

During the *Survey* year, in *McKennon v. Nashville Banner Publishing Co.*, the United States Court of Appeals for the Sixth Circuit held that an employer charged with discrimination was entitled to summary judgment upon a showing of after-acquired evidence of misconduct that indisputably would have resulted in the plaintiff's discharge had the evidence been discovered prior to the plaintiff's departure from the company.[44] In so holding, the Sixth Circuit further embraced the *Summers* approach to after-acquired evidence in employment discrimination cases, expanding its reach from cases involving resume and application fraud to litigation involving job misconduct.[45] Furthermore, the Sixth Circuit held that courts should apply *Summers* even in cases where the employee's misconduct relates to her claim of unlawful discrimination.[46]

In *McKennon*, the Nashville Banner Publishing Co. (the "Nashville Banner") terminated a sixty-two year old secretary who had worked for the Nashville Banner for thirty-nine years.[47] The employee, Christine McKennon, subsequently brought suit for age discrimination under the ADEA.[48] Upon taking her deposition, the Nashville Banner learned that McKennon had, during her employment, copied and removed several confidential documents from the Nashville Banner's offices and showed them to her husband.[49] The plaintiff asserted that she did this

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the mere conviction itself would not have resulted in the employee's termination, the falsification of the application would have resulted in her discharge. *Id.* at 304 n.1, 59 Fair Empl. Prac. Cas. (BNA) at 1250 n.1.

[43] *See Milligan-Jensen*, 975 F.2d at 304–05, 59 Fair Empl. Prac. Cas. (BNA) at 1251.

[44] F.3d 539, 543, 63 Fair Empl. Prac. Cas. (BNA) 355, 358 (6th Cir. 1993), *rev'd*, No. 93-1543, 1995 U.S. LEXIS 699 (Jan. 23, 1995).

[45] *Id.* at 541, 543, 63 Fair Empl. Prac. Cas. (BNA) at 356, 358.

[46] *Id.* at 543, 63 Fair Empl. Prac. Cas. (BNA) at 357–58. Although this sort of argument had been raised in and rejected by other courts, this was the first instance in which the Sixth Circuit addressed it. *Cf.* O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1467, 58 Fair Empl. Prac. Cas. (BNA) 536, 538 (D. Ariz. 1992) (after-acquired evidence of employee's removal and photocopying of his confidential personnel file acted to bar his recovery on claim of discrimination, despite his assertion that his purpose was to gather information to prepare for filing charge with Equal Employment Opportunity Commission).

[47] *McKennon*, 9 F.3d at 540, 63 Fair Empl. Prac. Cas. (BNA) at 355.

[48] *Id.*

[49] *Id.* The documents included a Payroll Ledger, a Profit and Loss Statement, notes, a memorandum, and an agreement between the employer and one of its managing employees. *Id.* at 540 n.1, 63 Fair Empl. Prac. Cas. (BNA) at 355 n.1.

in an effort to gather information regarding her job security, and to obtain evidence regarding her anticipated impending wrongful discharge on the basis of her age.[50]

Upon discovering this new information, the Nashville Banner sent McKennon a letter stating that it would have fired her immediately during her employment had it been aware of her misconduct.[51] The Nashville Banner then moved for summary judgment on the basis of the newly-acquired evidence of McKennon's misconduct.[52] The employer's motion for summary judgment assumed, for purposes of the motion, that it did unlawfully discriminate and would be liable to the plaintiff, but for the fact that, before discharge, McKennon had committed misconduct that, if discovered at that time, would have resulted in her dismissal.[53]

The Nashville Banner contended that under the *Summers* rule, as adopted by the Sixth Circuit in *Johnson* and *Milligan-Jensen*, it was entitled to summary judgment.[54] The district court found from the testimony of the Nashville Banner's officers and McKennon's deposition that the company indisputably would have fired McKennon had it known of the misconduct.[55] As a result, the district court granted summary judgment for the Nashville Banner, reasoning that the plaintiff's misconduct provided adequate and just cause for her dismissal as a matter of law.[56]

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the district court's decision and held that *Summers* mandates summary judgment as a matter of law for an employer charged with discrimination if evidence of the plaintiff's misconduct surfaces after the discharge, and the employer can prove it would have fired the employee based on that misconduct had the employer been aware of it.[57] The court followed the reasoning of *Summers* in acknow-

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[50] *Id.* at 540, 63 Fair Empl. Prac. Cas. (BNA) at 355.

[51] *Id.*

[52] *McKennon*, 9 F.3d at 541, 63 Fair Empl. Prac. Cas. (BNA) at 355–56.

[53] *Id.* In support of its motion, the Nashville Banner submitted sworn affidavits from several of its executives stating that McKennon would have been discharged for such conduct. *Id.* at 541 n.3, 63 Fair Empl. Prac. Cas. (BNA) at 356 n.3. Apparently, McKennon herself may have conceded this at one point during her deposition. *Id.* This issue, however, was disputed on appeal. *See* Brief for Petitioner to the United States Supreme Court at *24–25, McKennon v. Nashville Banner Publishing Co., 1994 WL 385636 (1995) (No. 93–1543).

[54] *See McKennon*, 9 F.3d at 541, 63 Fair Empl. Prac. Cas. (BNA) at 355–56.

[55] McKennon v. Nashville Banner Publishing Co., 797 F. Supp. 604, 608, 59 Fair Empl. Prac. Cas. (BNA) 60, 62–63 (M.D. Tenn. 1992).

[56] *Id.*, 59 Fair Empl. Prac. Cas. (BNA) at 63.

[57] *McKennon*, 9 F.3d at 541, 543, 63 Fair Empl. Prac. Cas. (BNA) at 356, 358. With respect to McKennon's contention that her "misconduct" related to her claim of unlawful discrimina-

ledging that even though the after-acquired evidence was not the cause for the discharge, it was both relevant to and determinative of McKennon's claim of "injury" and precluded the grant of any relief.[58] The wisdom and fairness of this approach to after-acquired evidence in employment discrimination cases has undergone vigorous challenge in academic journals.[59]

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tion—and therefore the *Summers* rule should not apply to her case—the Sixth Circuit ruled that such a nexus between the misconduct and the discrimination claim is irrelevant under the *Summers* doctrine. *Id.* at 543, 63 Fair Empl. Prac. Cas. (BNA) at 357–58. The employee claimed that she copied and removed the corporate documents solely for her own protection in the event the company terminated her for what she anticipated to be an unlawful reason. *Id.* at 540, 63 Fair Empl. Prac. Cas. (BNA) at 355. The *McKennon* court held that the particular nature of the employee's misconduct makes no difference in the court's treatment of after-acquired evidence unless the alleged misconduct is "protected" under the statute the employer has been charged with violating. *Id.* at 543 n.7, 63 Fair Empl. Prac. Cas. (BNA) at 358 n.7. Under the ADEA, if an employee's alleged "misconduct" is within a category of protected conduct listed in the statute's "opposition clause," the employer will be held liable for discriminatory actions taken as a result of an employee's protected conduct. 29 U.S.C. § 623(d). Such protected conduct is confined to an employee's opposition to unlawful discrimination under the ADEA, and to an employee's participation and assistance in investigations performed pursuant to the ADEA. *Id.* In support of its ruling, the Sixth Circuit cited two cases holding that copying and removing an employer's confidential documents is not protected conduct under the opposition clause. *McKennon*, 9 F.3d at 543 n.7, 63 Fair Empl. Prac. Cas. (BNA) at 357 n.7; *see* Jefferies v. Harris County Community Action Ass'n, 615 F.2d 1025, 1036, 22 Fair Empl. Prac. Cas. (BNA) 974, 981 (5th Cir. 1980); O'Day v. McDonnell Douglas Helicopter Co., 784 F. Supp. 1466, 1470, 58 Fair Empl. Prac. Cas. (BNA) 536, 538 (D. Ariz. 1992). The court determined that copying and removing confidential documents is not "protected" conduct under the ADEA, and therefore the relationship between McKennon's misconduct and the alleged discrimination was irrelevant. *McKennon*, 9 F.3d at 543 n.7, 63 Fair Empl. Prac. Cas. (BNA) at 358 n.7.

[58] *McKennon*, 9 F.3d at 541–42, 63 Fair Empl. Prac. Cas. (BNA) at 356. Noting that it had already adopted the *Summers* rule in cases of resume and application fraud, the court pointed out that the rule was an even better fit in *McKennon* because both *Summers* and *McKennon* involved job misconduct. *Id.* at 542, 63 Fair Empl. Prac. Cas. (BNA) at 357.

In addition to its reliance on *Summers* and Sixth Circuit precedent, the court gathered further support for its holding from a 1992 district court opinion in a factually similar case. *Id.* The court cited with approval *O'Day*, where an employer discovered at deposition that a former employee alleging that he was discriminated against under the ADEA had removed and copied elements of his personnel file from his supervisor's desk and showed portions of the material to a co-worker. 784 F. Supp. at 1467–68, 58 Fair Empl. Prac. Cas. (BNA) at 536–37. In *O'Day*, the United States District Court for the District of Arizona awarded summary judgment to the employer once it found that there "was no question as to the outcome of [the employee's] employment status" had the employer known of the misconduct: the employee would have been fired. *Id.* at 1469, 1470, 58 Fair Empl. Prac. Cas. (BNA) at 537, 539. The Sixth Circuit in *McKennon* found that, as in *O'Day*, the statements of the employer's officials that the employee would have been fired had the employer learned of the misconduct, absent any contrary evidence presented by the plaintiff, supported summary judgment for the defendant. *See McKennon*, 9 F.3d at 543, 63 Fair Empl. Prac. Cas. (BNA) at 357.

[59] *See, e.g.*, Rebecca H. White & Robert D. Brussack, *The Proper Role of After-Acquired Evidence in Employment Discrimination Litigation*, 35 B.C. L. REV. 49, 53 (1993) ("The after-acquired evidence doctrine in its current form amounts to an enormous loophole in the interpretation of our civil rights laws that must be closed."); Ann C. McGinley, *Reinventing Reality: The Impermissible*

On January 23, 1995, the United States Supreme Court unanimously reversed the Sixth Circuit's decision in *McKennon*, holding that after-acquired evidence of wrongdoing that would have resulted in the plaintiff's discharge is not a complete bar to recovery under employment discrimination statutes such as the ADEA.[60] Reasoning that such laws are intended to deter discrimination and compensate its victims, the Court concluded that allowing after-acquired evidence to operate as a complete bar to recovery frustrates both of these statutory purposes.[61] The Court ruled, however, that after-acquired evidence of the plaintiff's misconduct which would have resulted in the plaintiff's dismissal must be considered when determining the specific remedy to be awarded in employment discrimination cases.[62]

Writing for the Court, Justice Kennedy dismissed as erroneous the Sixth Circuit's conclusion that after-acquired evidence of employee misconduct can render the inquiry into allegations of employer discrimination entirely irrelevant.[63] The Court distinguished cases such as *McKennon* from "mixed motive" cases, in which both legitimate and unlawful motives spur an employer's alleged discriminatory action.[64]

Intrusion of After-Acquired Evidence in Title VII Litigation, 26 CONN. L. REV. 145, 161 (1993) ("The Civil Rights Act of 1991 clearly does not permit the intrusion of after-acquired evidence as an absolute defense . . . ."); Gian Brown, Note, *Employee Misconduct and the Affirmative Defense of "After-Acquired Evidence,"* 62 FORDHAM L. REV. 381, 384 (1993) ("the majority approach to wrongful discharge suits involving the affirmative defense of 'after-acquired' evidence is fundamentally flawed because it allows an employer to benefit from information that it discovered only as a result of its discrimination"); Samuel A. Mills, Note, *Toward an Equitable After-Acquired Evidence Rule*, 94 COLUM. L. REV. 1525, 1526 (1994) ("the 'complete defense' rule, initially set forth by the Tenth Circuit in *Summers* . . . is unjust and inconsistent with the purposes of both Title VII and the ADEA"); Kenneth G. Parker, Note, *After-Aquired Evidence in Employment Discrimination Cases: A State of Disarray*, 72 TEX. L. REV. 403, 406 (1993) ("the proper treatment of after-acquired evidence would never allow such evidence to affect employer liability"); Pauline Yoo, *The After-Acquired Evidence Doctrine*, 25 COLUM. HUM. RTS. L. REV. 219, 221 (1993) (the *Summers* doctrine leads to "harsh, unjust results . . . [and] should be reexamined in order to restore the goals of employment discrimination legislation"); Cheryl K. Zemelman, Note, *The After-Acquired Evidence Defense to Employment Discrimination Claims: The Privatization of Title VII and the Contours of Social Responsibility*, 46 STAN. L. REV. 175, 175 (1993) ("[the after-acquired evidence] defense undercuts the purposes of Title VII by allowing employers to avoid responsibility in those cases where discrimination was in fact a motivating factor in their employment decisions"). For a rare contrasting view, see William M. Muth, Jr., Note, *The After-Acquired Evidence Doctrine in Title VII Cases and the Challenge Presented by* Wallace v. Dunn Construction Co., *968 F.2d 1174 (11th Cir. 1992)*, 72 NEB. L. REV. 330, 332 (1993) ("Future decisions . . . will hopefully serve to solidify the logically sound reasoning behind the after-acquired evidence doctrine, leading to its general acceptance in courts throughout the nation").

[60] No. 93-1543, 1995 U.S. LEXIS 699, at *8, *9.

[61] *Id.* at *11–13.

[62] *Id.* at *16–18.

[63] *Id.* at *9.

[64] *Id.* at *14.

The Court observed that in after-acquired evidence cases, under the *Summers* doctrine, a court assumes for purposes of the summary judgment motion that the employer in fact terminated the employee solely for unlawful reasons.[65] Due to this key difference, the Court stated, the *Summers* doctrine erred in treating after-acquired evidence cases analogously to "mixed motive" cases.[66] "Mixed motive" precedent, the Court explained, is inapposite in the context of after-acquired cases, and therefore the Tenth Circuit inappropriately relied on it to bar the plaintiff's recovery in *Summers*.[67]

Although holding that after-acquired evidence cannot be a defense to employer liability, the Court concluded that evidence of employee misconduct may be relevant and admissible in the determination of relief for victims of unlawful discrimination.[68] The Court dismissed the argument that the equitable doctrine barring recovery by plaintiffs with unclean hands should bar the plaintiff's recovery in this case.[69] It noted that that doctrine does not apply where Congress has authorized broad equitable relief in an effort to accomplish important national policies, such as the eradication of workplace discrimination.[70] The Court concluded, however, that both common sense and the need to preserve employers' lawful prerogatives in the usual course of their business required courts to consider the possibility of employee wrongdoing when fashioning appropriate equitable relief.[71] According to the Court, employers may rely on such evidence to limit damages only when the misconduct would have resulted in the employee's termination had the employer become aware of it.[72]

Although unwilling to promulgate a general rule with respect to relief to be awarded in after-acquired evidence cases, the Court held that in cases such as *McKennon*, where an employer proves that the employee would have been discharged at the time of the misconduct had the employer discovered it, neither reinstatement nor front pay is an appropriate remedy.[73] Back pay, on the other hand, may be awarded in such instances.[74] In computing back pay, *McKennon* instructs courts to measure such compensation from the date of the unlawful discharge

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[65] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *14–15.
[66] *Id.*
[67] *Id.*
[68] *Id.* at *16.
[69] *Id.* at *16–17.
[70] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *16–17.
[71] *Id.* at *17–19.
[72] *Id.* at *20–21.
[73] *Id.* at *18.
[74] *Id.* at *19.

to the date the employer discovered the "after-acquired" information and could have lawfully terminated the employee.[75]

The United States Supreme Court, through its invalidation of the *Summers* approach to after-acquired evidence, has removed a substantial obstacle to the effective enforcement of the ADEA and other statutes enacted to eliminate discrimination in the workplace.[76] As the Court noted, the two paramount purposes of employment discrimination statutes are to deter violations of the law and to compensate victims of unlawful discrimination.[77] By affording an employer the opportunity to avoid all liability, the *Summers* treatment of after-acquired evidence as a complete defense to discrimination claims reduced the deterrent effect of employment discrimination statutes and risked denying compensation to victims of illegal discrimination.[78]

The Court in *McKennon* correctly emphasized that at the liability stage of an employment discrimination lawsuit, the sole relevant issue is the legality of the employer's motivation at the time of the employment decision.[79] After-acquired evidence concerning the employee's background or conduct is irrelevant and should be inadmissible at that stage.[80] It is, however, both reasonable and appropriate for courts to preclude the grant of certain remedies, such as reinstatement or injunctive relief, in instances where an employer has discovered evidence of the plaintiff's application fraud or job misconduct, and can prove that it would have rejected or fired the plaintiff on those grounds.[81] The Court's placement of the burden of proof on the defendant ensures that victims of discrimination will be entitled to full relief in all but the more serious instances of employee wrongdoing.[82] On the other hand, other remedies such as declaratory relief, attorney's fees, partial back pay, compensatory damages for emotional distress and punitive damages, if otherwise available under the relevant statute, properly remain open for the court's consideration.[83]

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[75] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *19-20. The Court further stated that courts may consider extraordinary equitable circumstances affecting the legitimate interests of either party in their determination of appropriate relief. *Id.* at *20.

[76] *See, e.g.*, Mardell v. Harleysville Life Insurance Co., No. 93-3258, 1994 WL 396512, at *10 (3d Cir. Aug. 2, 1994) ("the *Summers* approach . . . frustrates the paramount objective of Title VII and ADEA, to deter violations of the law").

[77] *See id.* at *10, *11.

[78] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *19-20.

[79] *See id.* at *15.

[80] *See id.*

[81] *See id.* at *14.

[82] *Id.* at *20.

[83] *See McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *19-20; Wallace v. Dunn Constr. Co., 968 F.2d 1174, 1182-83, 59 Fair Empl. Prac. Cas. (BNA) 997, 1003-04 (11th Cir. 1992).

The Court's treatment of after-acquired evidence upholds the legal rights of the employer to make legitimate employment decisions, yet still provides appropriate relief to victims of unlawful discrimination.[84] In circumscribing the use of after-acquired evidence to the remedies stage of employment discrimination lawsuits, the Court's decision in *McKennon* succeeds in drawing a boundary between the preservation of an employer's lawful managerial role and the compensation of an individual who suffered discrimination.[85] For these reasons, the Supreme Court correctly ruled that the Sixth Circuit's approach to the after-acquired evidence in *McKennon* was fatally flawed in failing to distinguish between a discriminatory employer's liability and an employee's entitlement to particular forms of relief.

Although *McKennon's* invalidation of the *Summers* rule is a major step forward, the decision may not adequately resolve all issues surrounding the role of after-acquired evidence.[86] For example, the decision may not provide sufficient safeguards to ensure that juries presented with evidence of the plaintiff's misconduct do not respond to such information by refusing to award damages other than back pay limited to the period from the unlawful termination to the employer's discovery of the wrongdoing.[87] Similarly, the ability of employers to "cut off" back pay awards—and potentially limit overall recoveries—by producing after-acquired evidence will likely result in their routine undertaking of extensive discovery.[88] Although the opinion in *McKennon* encourages courts to utilize the awarding of attorney's fees and Rule 11 sanctions to prevent discovery abuse, it is unclear whether such measures will in fact be implemented regularly and uniformly.[89] Lastly, the degree of employers' discovery will be matched by employees' discovery efforts intended to prove that the employer would not have in fact terminated the plaintiff for the misconduct.[90] Such comprehensive discovery by both parties may increase the costs of litigating discrimination claims.[91]

In sum, the United States Court of Appeals for the Sixth Circuit, in a decision subsequently reversed by the United States Supreme Court,

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[84] *See, e.g.*, White & Brussack, *supra* note 59, at 95.

[85] *See* Mardell v. Harleysville Life Ins., No. 93-3258, 1994 WL 396512, at *11 (3d Cir. Aug. 2, 1994); *see Wallace*, 968 F.2d at 1181, 59 Fair Empl. Prac. Cas. (BNA) at 1003.

[86] For early reactions from the bar to the Supreme Court's decision in *McKennon*, see Aaron M. Grossman, *Damages Are Reduced in Discrimination by Worker's Misconduct*, LAW. WKLY. USA, Jan. 30, 1995, at 1.

[87] *Id.* at 13.

[88] *Id.*

[89] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *20–21.

[90] Grossman, *supra* note 86, at 13.

[91] *Id.*

held in *McKennon v. Nashville Banner Publishing Co.* that after-acquired evidence mandates summary judgment for an employer charged with discrimination under the ADEA, so long as the employer demonstrates that the employee would have been discharged had the misconduct surfaced while the employee remained employed by the company.[92] The Supreme Court rejected the Sixth Circuit's treatment of after-acquired evidence, holding that such information does not completely bar an employee's claim or recovery under the ADEA.[93] Although *McKennon* invalidates the *Summers* "complete defense" approach to after-acquired evidence, the decision requires courts to consider such evidence when ordering specific remedies, provided the employer proves that the employee would have indeed been terminated for the misconduct had the employer been aware of it.[94] If the employer satisfies this burden of proof, *McKennon* articulates a general rule that the plaintiff is not entitled to either reinstatement or front pay, and that back pay should be calculated from the date of the unlawful termination to the date that the employer discovers the employee's wrongdoing.[95]

III. Federal Income Tax Consequences

A. **Tax Status of Damages Awarded Under the Age Discrimination in Employment Act:* Schmitz v. Commissioner[1] *and* Downey v. Commissioner[2]

Section 61(a) of the Internal Revenue Code ("IRC") defines gross income as all income from whatever source derived.[3] IRC section 104(a)(2) excludes from gross income damages a taxpayer receives, either as settlement or trial award, in compensation for personal injuries or sickness.[4] The regulations promulgated under section 104(a)(2) narrow the scope of excluded damages to those received through the prosecution or settlement of an action based on "tort or tort type rights."[5] Thus, in determining the tax status of damages received under

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[92] 9 F.3d 539, 543, 63 Fair Empl. Prac. Cas. (BNA) 355, 358 (6th Cir. 1993), *rev'd*, No. 93-1543, 1995 U.S. LEXIS 699 (1995).

[93] *McKennon*, No. 93-1543, 1995 U.S. LEXIS 699, at *8, *9.

[94] *Id.* at *9, *18, *20.

[95] *Id.* at *18–20.

* By Elizabeth A. Taylor, Staff Member, Boston College Law Review.

[1] 34 F.3d 790, 65 Fair Empl. Prac. Cas. (BNA) 1195 (9th Cir. 1994).

[2] 33 F.3d 836, 65 Fair Empl. Prac. Cas. (BNA) 1192 (7th Cir. 1994).

[3] 26 U.S.C. § 61(a) (1988).

[4] 26 U.S.C. § 104(a)(2) (1988).

[5] 26 C.F.R. § 1.104–1(c) (1994).

the Age Discrimination in Employment Act ("ADEA"),[6] courts must consider whether ADEA claims reflect the characteristics of tort-like causes of action and are therefore excluded from gross income by section 104(a)(2).[7]

In 1986, in *Threlkeld v. Commissioner*, the United States Tax Court held that section 104(a)(2) excluded from gross income all compensatory damages received in settlement of a malicious prosecution claim.[8] The taxpayer in *Threlkeld* did not report as gross income settlement damages he received for injury to his professional reputation deriving from a malicious prosecution claim.[9] The court reasoned that because section 104(a)(2) excludes damages received as compensation for personal injuries, the court's sole inquiry should be whether the underlying claim was one for "personal injuries."[10] The court further reasoned that this action for malicious prosecution constituted an action for personal injuries because it allows recovery for injury to reputation and because the law of Tennessee, where the plaintiffs brought the action, characterizes malicious prosecution as a personal tort action.[11] Thus, the court held that the underlying cause of action was tort-like within the meaning of the regulations promulgated under section 104(a)(2) and therefore that the taxpayer could exclude from gross income the damages he received.[12]

In 1990, in *Rickel v. Commissioner*, the United States Court of Appeals for the Third Circuit applied the reasoning of *Threlkeld* and held that section 104(a)(2) excluded from gross income damages received in an ADEA action.[13] In *Rickel*, a taxpayer did not report as gross income two payments of a settlement he received in an ADEA suit against his former employer.[14] The court analogized age discrimination to a personal injury because the employer's discrimination constituted an injury to the individual rights of the person.[15] The court held, therefore, that section 104(a)(2) excluded all damages flowing

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[6] 29 U.S.C. §§ 621–634 (1988).

[7] *See, e.g.*, Redfield v. Insurance Co. of N. Am., 940 F.2d 542, 547, 56 Fair Empl. Prac. Cas. (BNA) 977, 979 (9th Cir. 1991); Pistillo v. Commissioner, 912 F.2d 145, 148, 53 Fair Empl. Prac. Cas. (BNA) 1219, 1221 (6th Cir. 1990); Rickel v. Commissioner, 900 F.2d 655, 658, 52 Fair Empl. Prac. Cas. (BNA) 1389, 1391 (3d Cir. 1990).

[8] 87 T.C. 1294, 1308 (1986).

[9] *Id.* at 1297.

[10] *Id.* at 1299.

[11] *Id.* at 1307.

[12] *Id.* at 1308.

[13] 900 F.2d 655, 664, 52 Fair Empl. Prac. Cas. (BNA) 1389, 1395 (3d Cir. 1990).

[14] *Id.* at 657, 52 Fair Empl. Prac. Cas. (BNA) at 1390.

[15] *Id.* at 663, 52 Fair Empl. Prac. Cas. (BNA) at 1395 (analogizing an ADEA violation to racial discrimination).

from this age discrimination action because of the tort-like nature of the underlying claim.[16]

Similarly, in 1990, in *Pistillo v. Commissioner*, the United States Court of Appeals for the Sixth Circuit held that section 104(a)(2) excludes age discrimination damages.[17] In *Pistillo*, a taxpayer did not include in his gross income the amount he received as settlement of an ADEA claim against his former employer.[18] Following the reasoning of *Threlkeld* and *Rickel*, the court focused on the nature of the claim to determine if the underlying cause of action was tort-like.[19] The court allowed that the injury of lost wages is not as "personal" as the physical or emotional injuries resulting from other torts.[20] Nevertheless, it reasoned that the underlying cause of action for which plaintiffs receive lost wages is tort-like because it seeks to compensate for indignities, insults and invasions of individual rights.[21] Therefore, the court held that section 104(a)(2) excluded damages received by the taxpayer in settlement of his age discrimination suit as damages received on account of personal injuries.[22]

In 1991, in *Redfield v. Insurance Co. of North America*, the United States Court of Appeals for the Ninth Circuit joined the Third and Sixth Circuits in excluding a settlement amount in an age discrimination suit from a person's taxable income.[23] In a suit brought under the ADEA and the California Fair Employment and Housing Act, a federal district court in the Ninth Circuit awarded the taxpayer economic, emotional distress and punitive damages.[24] The taxpayer's former employer withheld taxes from the payment of the economic damages portion of the award and the taxpayer refused to acknowledge satisfaction of the judgment, arguing that it was not taxable income.[25] The Ninth Circuit analogized ADEA actions to other federal discrimination causes of action, which many courts have held to be actions sounding in tort, and concluded that ADEA actions are tort-like.[26] The court further reasoned that the nature of a claim under the ADEA is tort-like, rather than contractual, because a claim can arise even in the absence

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[16] *Id.* at 663–64, 52 Fair Empl. Prac. Cas. (BNA) at 1395.

[17] 912 F.2d 145, 148, 53 Fair Empl. Prac. Cas. (BNA) 1219, 1221 (6th Cir. 1990).

[18] *Id.* at 147, 53 Fair Empl. Prac. Cas. (BNA) at 1220.

[19] *See id.* at 149–50, 53 Fair Empl. Prac. Cas. (BNA) at 1222–23.

[20] *See id.* at 150, 53 Fair Empl. Prac. Cas. (BNA) at 1223.

[21] *See id.*

[22] *Pistillo*, 912 F.2d at 150, 53 Fair Empl. Prac. Cas. (BNA) at 1223.

[23] 940 F.2d 542, 547, 56 Fair Empl. Prac. Cas. (BNA) 977, 979 (9th Cir. 1991).

[24] *Id.* at 544, 56 Fair Empl. Prac. Cas. (BNA) at 977.

[25] *Id.*

[26] *Id.* at 546, 56 Fair Empl. Prac. Cas. (BNA) at 979.

of a written employment contract.[27] Therefore, the Ninth Circuit excluded ADEA damages from gross income under section 104(a)(2) because they flow from a tort-like cause of action.[28]

In 1992, the United States Supreme Court shifted the focus of analysis drastically, in *United States v. Burke*, holding that section 104(a)(2) does not exclude back pay awards received in settlement of Title VII claims.[29] The taxpayer in *Burke* filed suit under Title VII of the Civil Rights Act of 1964, alleging that her employer discriminated unlawfully on the basis of sex in paying salaries.[30] The parties reached a settlement and the employer withheld federal income tax from the amount it paid to the taxpayer.[31]

The Court reasoned that because the remedies awarded are central to the definition of torts, courts should focus on the nature of the remedies available under a particular statute in determining the tax status of damages awarded under such statutes.[32] The Court concluded that because the remedies provided under Title VII did not compensate a plaintiff for any of the traditional harms associated with torts, such as pain and suffering, emotional distress or harm to reputation, a claim under Title VII was not tort-like.[33] Thus, the Court held that section 104(a)(2) does not exclude Title VII damages from gross income.[34]

In decisions applying *Burke* to ADEA cases, the federal courts have split over whether damages awarded in ADEA suits constitute taxable gross income.[35] The United States District Court for the Eastern District of California and the United States Claims Court distinguished *Burke*, holding that ADEA claims are more tort-like than Title VII claims and

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[27] *See id.*

[28] *Redfield*, 940 F.2d at 547, 56 Fair Empl. Prac. Cas. (BNA) at 979.

[29] *See* 112 S. Ct. 1867, 1874, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1329 (1992). Before the enactment of the Civil Rights Act of 1991, Title VII limited available remedies to back pay, injunctions and other equitable relief. *See Burke*, 112 S. Ct. at 1872 n.8, 58 Fair Empl. Prac. Cas. (BNA) at 1327 n.8. All references are to the "unamended" Title VII.

[30] *Id.* at 1868–69, 58 Fair Empl. Prac. Cas. (BNA) at 1325.

[31] *Id.* at 1869, 58 Fair Empl. Prac. Cas. (BNA) at 1325.

[32] *See id.* at 1871–72, 58 Fair Empl. Prac. Cas. (BNA) at 1326–27.

[33] *Id.* at 1873–74, 58 Fair Empl. Prac. Cas. (BNA) at 1328–29.

[34] *Burke*, 112 S. Ct. at 1874, 58 Fair Empl. Prac. Cas. (BNA) at 1329.

[35] *See, e.g.*, Shaw v. United States, 853 F. Supp. 1378, 1382, 64 Fair Empl. Prac. Cas. (BNA) 961, 964 (M.D. Ala. 1994) (holding ADEA damages not excludable); Rice v. United States, 834 F. Supp. 1241, 1245, 63 Fair Empl. Prac. Cas. (BNA) 1189, 1192 (E.D. Cal. 1993) (holding ADEA damages excludable), *aff'd*, 35 F.3d 571 (9th Cir. 1994); Maleszewski v. United States, 827 F. Supp. 1553, 1557, 62 Fair Empl. Prac. Cas. (BNA) 327, 330 (N.D. Fla. 1993) (holding ADEA damages not excludable); Bennett v. United States, 30 Cl. Ct. 396, 401, 65 Fair Empl. Prac. Cas. (BNA) 1375, 1379 (1994) (holding ADEA damages excludable).

thus section 104(a)(2) excludes them from gross income.[36] In contrast, the United States District Court for the Northern District of Florida and the United States District Court for the Middle District of Alabama followed *Burke*, holding that the relief available under the ADEA was essentially the same as that afforded to Title VII plaintiffs and, therefore, section 104(a)(2) does not exclude ADEA damages from gross income.[37]

In 1993, in *Rice v. United States*, the United States District Court for the Eastern District of California held that section 104(a)(2) excludes ADEA damages.[38] The jury in *Rice* awarded the plaintiff general and liquidated damages under the ADEA.[39] The plaintiff and his wife reported as part of their 1988 gross income the general damages, but not the liquidated damages.[40] The taxpayers then sought a refund of the taxes they paid on the general damages.[41] The court analyzed the available remedies under the ADEA and contrasted them with those available under Title VII, the statute at issue in *Burke*, to determine if the underlying claim redressed a tort-like personal injury.[42] The court rejected the Federal Government's proposal that ADEA liquidated damages constitute a contractual remedy for economic harm.[43] Instead, it reasoned that the characterization of ADEA liquidated damages by other courts as either compensatory or punitive evinced a similarity to traditional tort remedies.[44] The court concluded that because of its provision for liquidated damages and its provision for a jury trial, the ADEA, unlike Title VII, "sounds basically in tort" and therefore section 104(a)(2) excludes all damages awarded under the ADEA.[45]

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[36] *Rice*, 834 F. Supp. at 1245, 63 Fair Empl. Prac. Cas. (BNA) at 1192; *Bennett*, 30 Cl. Ct. at 401, 65 Fair Empl. Prac. Cas. (BNA) at 1379.

[37] *Shaw*, 853 F. Supp. at 1382, 64 Fair Empl. Prac. Cas. (BNA) at 964; *Maleszewski*, 827 F. Supp. at 1557, 62 Fair Empl. Prac. Cas. (BNA) at 330.

[38] 834 F. Supp. at 1245, 63 Fair Empl. Prac. Cas. (BNA) at 1192.

[39] *Id.* at 1242, 63 Fair Empl. Prac. Cas. (BNA) at 1190. The ADEA provides for general damages in the amount of unpaid wages and overtime compensation and liquidated damages of an equal amount in "cases of willful violations." 29 U.S.C. § 626(b).

[40] *Rice*, 834 F. Supp. at 1242–43, 63 Fair Empl. Prac. Cas. (BNA) at 1190.

[41] *Id.* at 1243, 63 Fair Empl. Prac. Cas. (BNA) at 1190.

[42] *See id.* at 1244, 63 Fair Empl. Prac. Cas. (BNA) at 1191.

[43] *Id.*

[44] *Id.* at 1244–45, 63 Fair Empl. Prac. Cas. (BNA) at 1191–92 (citing Fortino v. Quasar Co., 950 F.2d 389, 397–98 (7th Cir. 1991); Powers v. Grinnell Corp., 915 F.2d 34, 41–42 (1st Cir. 1990); Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 281–82 (2d Cir. 1987)).

[45] *Rice*, 834 F. Supp. at 1245, 63 Fair Empl. Prac. Cas. (BNA) at 1192 (quoting United States v. Burke, 112 S. Ct. 1867, 1874, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1328 (1992)).

Similarly, in 1994, in *Bennett v. United States*, the United States Claims Court held that section 104(a)(2) excludes ADEA settlement payments for back pay and liquidated damages.[46] In *Bennett*, taxpayers sought refunds of federal income taxes they paid in 1986 on a settlement payment in an age discrimination class action lawsuit against United Airlines.[47] The court rejected the Federal Government's argument that because ADEA plaintiffs may not recover many of the remedies available to tort claimants, such as emotional distress and pain and suffering damages, the ADEA creates a contractual claim.[48] The court reasoned that the ADEA, through awards of back pay and liquidated damages, provides a remedial structure consistent with traditional tort liability and, therefore, it redresses a tort-like personal injury.[49] The court further reasoned that the availability of a jury trial, which exists in tort cases, adds to the tort-like nature of a claim under the ADEA and distinguishes this case from a Title VII claim such as *Burke*.[50] For these reasons, the court held that section 104(a)(2) excludes ADEA settlement payments.[51]

In contrast, in 1993, in *Maleszewski v. United States*, the United States District Court for the Northern District of Florida held that taxpayers could not exclude amounts received in settlement of an ADEA claim under section 104(a)(2).[52] In *Maleszewski*, the taxpayers sought a refund of federal income taxes they paid on an age discrimination settlement award from Chrysler Corporation.[53] The court reasoned that the relief available to a successful ADEA claimant essentially mirrored that afforded to Title VII claimants, with the exception that ADEA plaintiffs can sue for liquidated damages, and under *Burke*, therefore, plaintiffs may not exclude ADEA damages from gross income.[54] The court reasoned that the provision for liquidated damages did not sufficiently distinguish ADEA claims from Title VII claims because the inclusion of the liquidated damages provision in the ADEA does not convert every ADEA award into "personal injury" damages for tax purposes.[55] Unlike tort damages, the court reasoned, liquidated damages do not serve to compensate the victim; rather they are de-

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[46] 30 Cl. Ct. 396, 401, 65 Fair Empl. Prac. Cas. (BNA) 1375, 1379 (1994).
[47] *Id.* at 398, 65 Fair Empl. Prac. Cas. (BNA) at 1376.
[48] *Id.* at 400, 65 Fair Empl. Prac. Cas. (BNA) at 1377.
[49] *Id.* at 399, 65 Fair Empl. Prac. Cas. (BNA) at 1377.
[50] *Id.*
[51] *Bennett*, 30 Cl. Ct. at 401, 65 Fair Empl. Prac. Cas. (BNA) at 1379.
[52] 827 F. Supp. 1553, 1557, 62 Fair Empl. Prac. Cas. (BNA) 327, 330 (N.D. Fla. 1993).
[53] *Id.* at 1555, 62 Fair Empl. Prac. Cas. (BNA) at 328.
[54] *See id.* at 1556, 62 Fair Empl. Prac. Cas. (BNA) at 329.
[55] *Id.* at 1557, 62 Fair Empl. Prac. Cas. (BNA) at 329.

signed to deter willful violations of the ADEA.[56] Consequently, the court held that the ADEA does not redress tort-like personal injuries for purposes of section 104(a)(2) and the taxpayer could not exclude from gross income the amount received as damages in an ADEA claim.[57]

Similarly, in 1994, in *Shaw v. United States*, the United States District Court for the Middle District of Alabama adopted the reasoning of *Maleszewski* by holding that plaintiffs may not exclude from gross income ADEA liquidated damages.[58] The taxpayer in *Shaw* sought a refund of the federal income tax he paid on the liquidated damages portion of an ADEA award against Auburn University.[59] The court reasoned that despite the provision for liquidated damages, the remedial scheme of the ADEA is merely a method for awarding lost benefits and wages.[60] The court held that because these liquidated damages only punish and deter willful violators of the Act rather than compensate a victim of a tort, damages awarded under the ADEA are not damages resulting from personal injury and, therefore, section 104(a)(2) does not exclude them from gross income.[61]

In 1994, in *Hawkins v. United States*, the United States Court of Appeals for the Ninth Circuit developed a test for determining whether taxpayers may exclude damages under section 104(a)(2).[62] Although *Hawkins* involved a suit for breach of good faith and fair dealing, the Ninth Circuit has since applied the *Hawkins* test to ADEA claims.[63] The *Hawkins* court held that damages in a suit for breach of good faith and fair dealing do not compensate for personal injuries and consequently taxpayers may not exclude them from gross income under section 104(a)(2).[64]

In *Hawkins*, the taxpayers recovered compensatory and punitive damages from Allstate Insurance Company for breach of good faith and fair dealing.[65] The taxpayers initially reported the punitive damages as gross income, but later filed an amended return, claiming that they could exclude the punitive damages under section 104(a)(2).[66]

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[56] *Id.* at 1556, 62 Fair Empl. Prac. Cas. (BNA) at 329.

[57] *Maleszewski*, 827 F. Supp. at 1557, 62 Fair Empl. Prac. Cas. (BNA) at 330.

[58] 853 F. Supp. 1378, 1382, 64 Fair Empl. Prac. Cas. (BNA) 961, 963–64 (M.D. Ala. 1994).

[59] *Id.* at 1379, 64 Fair Empl. Prac. Cas. (BNA) at 961.

[60] *Id.* at 1382, 64 Fair Empl. Prac. Cas. (BNA) at 963–64.

[61] *Id.*, 64 Fair Empl. Prac. Cas. (BNA) at 964.

[62] 30 F.3d 1077, 1082 (9th Cir. 1994).

[63] *See* Schmitz v. Commissioner, 34 F.3d 790, 792, 65 Fair Empl. Prac. Cas. (BNA) 1195, 1196 (9th Cir. 1994).

[64] *Hawkins*, 30 F.3d at 1084.

[65] *Id.* at 1079.

[66] *Id.*

The Ninth Circuit reasoned that the language of section 104(a)(2) concerning "damages received on account of personal injury" could refer to *all* damages recovered in a personal injury lawsuit, or it could refer to only those damages that purport to compensate the taxpayer for personal injuries.[67] The court reasoned that because punitive damages punish a tortfeasor's egregious conduct, rather than compensate for personal injuries, courts do not necessarily award them "on account of" personal injury.[68]

The court created a two-part test for determining whether section 104(a)(2) excludes damages.[69] First, the court must determine if the underlying claim is tort-like within the meaning of *Burke*; then, the court must decide if the damages flowing from that claim compensate for a personal injury and thus are awarded "on account of" a personal injury.[70] In *Hawkins*, the parties agreed that the taxpayer's lawsuit for breach of good faith and fair dealing was a tort-like action; thus, the court addressed only the issue of whether the punitive damages had some compensatory purpose.[71] The court held that because the punitive damages only punish the tortfeasor and do not serve to compensate the plaintiff for personal injury, section 104(a)(2) does not exclude them.[72]

During the *Survey* year, the United States Court of Appeals for the Ninth Circuit, in *Schmitz v. Commissioner*, and the United States Court of Appeals for the Seventh Circuit, in *Downey v. Commissioner*, split over whether section 104(a)(2) excludes ADEA damage awards from gross income.[73] In both cases, the taxpayers had received from United Airlines ADEA settlement payments for back pay and liquidated damages, and had reported as gross income only the back pay portions of the payments.[74] The Ninth Circuit, applying the two-part *Hawkins* test, held that the ADEA created a tort-like cause of action which compensates for a personal injury and that section 104(a)(2) excludes ADEA liquidated damages from gross income.[75] Conversely, the Seventh Circuit, applying *Burke*, held that section 104(a)(2) does not exclude ADEA

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[67] *Id.* at 1080.

[68] *See id.*

[69] *Hawkins*, 30 F.3d at 1082.

[70] *See id.*

[71] *Id.* at 1080.

[72] *See id.* at 1084.

[73] *See* Schmitz v. Commissioner, 34 F.3d 790, 796, 65 Fair Empl. Prac. Cas. (BNA) 1195, 1200 (9th Cir. 1994); Downey v. Commissioner, 33 F.3d 836, 840, 65 Fair Empl. Prac. Cas. (BNA) 1192, 1195 (7th Cir. 1994).

[74] *See Schmitz*, 34 F.3d at 791, 65 Fair Empl. Prac. Cas. (BNA) at 1196; *Downey*, 33 F.3d at 837, 65 Fair Empl. Prac. Cas. (BNA) at 1192.

[75] *Schmitz*, 34 F.3d at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

damages because they do not compensate for the traditional elements of a personal injury.[76]

In *Schmitz*, John Schmitz received from United Airlines, his former employer, $115,050 in settlement of his age discrimination claims.[77] The settlement agreement categorized half of this payment as back pay and half as ADEA liquidated damages.[78] Schmitz and his wife filed a joint federal income tax return on which they reported the back pay portion of the settlement but not the liquidated damages portion.[79] The Commissioner of Internal Revenue ("Commissioner") issued a notice of deficiency, alleging that the entire amount was taxable.[80] The Schmitzes first filed a tax court petition arguing that section 104(a)(2) excluded the liquidated damages portion of the settlement from gross income.[81] Later, they amended their complaint arguing that they could exclude both the back pay and the liquidated damages.[82] The Tax Court held that section 104(a)(2) excluded the entire settlement.[83] The Commissioner appealed this decision to the United States Court of Appeals for the Ninth Circuit.[84]

The Ninth Circuit applied the two-part test it created in *Hawkins* for determining whether section 104(a)(2) excludes from gross income damages received in a lawsuit.[85] The court first looked at whether the underlying cause of action was tort-like.[86] The court noted that until the *Burke* decision, the case law firmly established that ADEA lawsuits were tort-like.[87] It further noted that these cases relied on the *Threlkeld* court's holding, which the Supreme Court amended in *Burke*.[88] Thus, the court stated, after *Burke*, a statute must not only redress an invasion of individual rights, as the *Threlkeld* court held, but also must evidence a tort-like conception of injury and remedy before plaintiffs can exclude the damages.[89]

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[76] *Downey*, 33 F.3d at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195.
[77] *Schmitz*, 34 F.3d at 791, 65 Fair Empl. Prac. Cas. (BNA) at 1196.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Schmitz*, 34 F.3d at 791, 65 Fair Empl. Prac. Cas. (BNA) at 1196.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 792, 65 Fair Empl. Prac. Cas. (BNA) at 1196.
[86] *See id.*
[87] *Schmitz*, 34 F.3d at 792, 65 Fair Empl. Prac. Cas. (BNA) at 1196–97.
[88] *See id.* at 792, 65 Fair Empl. Prac. Cas. (BNA) at 1197.
[89] *See id.*

In applying part one of the *Hawkins* test, deciding whether an ADEA claim was tort-like within the meaning of *Burke*, the court focused on the ADEA provisions for jury trials and for liquidated damages.[90] The court analogized the jury trials and liquidated damages available under the ADEA to what ordinary tort plaintiffs may receive.[91] Because jury trials are available in tort cases and because liquidated damages resemble tort damages for non-pecuniary losses by compensating plaintiffs beyond lost wages, the court concluded that the ADEA is tort-like under *Burke*.[92]

The court disagreed with the Commissioner's assertion that ADEA liquidated damages represent only punitive damages and are not analogous to traditional compensatory tort damages such as pain and suffering or emotional distress.[93] Although conceding that ADEA liquidated damages might have a punitive purpose, the court reasoned that such a purpose coexists with compensatory goals.[94] The court also rejected the Commissioner's argument that ADEA actions arise out of contract rights and therefore cannot be tort-like for the purpose of section 104(a)(2).[95] The court further reasoned that because the duty not to discriminate exists regardless of the parties' contractual relationship and because the ADEA applies not only to firing and promotion decisions, but also to hiring decisions when no contract exists, an action under the ADEA is more tort-like than contract-like.[96] For these reasons, the court held that under part one of the *Hawkins* test, the ADEA creates a tort-like cause of action.[97]

The Ninth Circuit turned next to the second part of the *Hawkins* test, whether plaintiffs receive ADEA liquidated damages "on account of" personal injuries.[98] Examining section 104(a)(2), the court agreed with the Commissioner that the "on account of" language implies that taxpayers may not exclude damages unless the damages have some compensatory purpose and bear some relationship to the taxpayer's underlying personal injury.[99] The court disagreed, however, with the Commissioner's argument that the Schmitzes received liquidated damages "on account of" United Airlines' willful misconduct rather than

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[90] *Id.* at 793, 65 Fair Empl. Prac. Cas. (BNA) at 1197.
[91] *See id.* at 794, 65 Fair Empl. Prac. Cas. (BNA) at 1198.
[92] *See Schmitz*, 34 F.3d at 793–94, 65 Fair Empl. Prac. Cas. (BNA) at 1197–98.
[93] *See id.* at 793, 65 Fair Empl. Prac. Cas. (BNA) at 1197.
[94] *See id.*
[95] *Id.*
[96] *Id.* at 793, 65 Fair Empl. Prac. Cas. (BNA) at 1198.
[97] *Schmitz*, 34 F.3d at 794, 65 Fair Empl. Prac. Cas. (BNA) at 1198.
[98] *Id.*
[99] *Id.*

"on account of" their personal injuries.[100] The court reasoned that because liquidated damages were traditionally awarded to compensate victims for damages that were too difficult to prove, they represent compensation for the victim, not punishment of the tortfeasor.[101] The court added that Congress would not have labeled these damages "liquidated" if it intended them to be punitive.[102] The court further reasoned that liquidated damages do not lose their compensatory purpose merely because they are available only in cases of willful discrimination.[103] Thus, having concluded that ADEA claims are tort-like and liquidated damages arising out of those claims compensate for personal injury, the court held that section 104(a)(2) excludes ADEA liquidated damages from gross income.[104]

In a concurring opinion, Circuit Judge Trott, although agreeing with the result of the majority's decision, disagreed with the majority's adoption of the two-part *Hawkins* test.[105] Instead, he argued, the court should have focused only on whether an ADEA claim is a tort-like cause of action, the first part of the *Hawkins* test.[106] He asserted that if the majority found that claims under the Act were tort-like, a taxpayer should be able to exclude all damages he or she received on account of those claims.[107]

By using the *Hawkins* two-part test, Circuit Judge Trott argued, the majority made an artificial distinction between ADEA liquidated damages and punitive damages in order to find the former "received on account of personal injury" in the language of section 104(a)(2).[108] He argued that ADEA liquidated damages resemble punitive damages because they are only awarded in cases of willful violations.[109] He found support for this argument in Ninth Circuit case law, which has consistently treated ADEA liquidated damages as punitive damages.[110] Therefore, by applying the *Hawkins* rule, which states that section 104(a)(2) does not exclude punitive damages from gross income, Circuit Judge

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[100] *Id.*

[101] *Id.*

[102] *Schmitz*, 34 F.3d at 795, 65 Fair Empl. Prac. Cas. (BNA) at 1199.

[103] *Id.* The Conference Report for the 1978 Amendments to the ADEA states that liquidated damages compensate the aggrieved party for non-personal losses arising out of a willful violation of the ADEA. *Id.* at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[104] *Id.* at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[105] *Id.*

[106] *Id.* at 796–97, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[107] *Schmitz*, 34 F.3d at 797, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[108] *See id.*

[109] *Id.* at 797, 65 Fair Empl. Prac. Cas. (BNA) at 1201.

[110] *Id.*

Trott argued that the majority should have found ADEA liquidated damages not excludable.[111] Instead, he asserted, the majority drew a fallacious distinction between liquidated and punitive damages merely in order to find liquidated damages excludable under the *Hawkins* test.[112] He rejected the majority's rationale that ADEA liquidated damages serve both a compensatory and punitive purpose, stating that under Ninth Circuit law, liquidated damages serve no compensatory purpose.[113] He argued that the majority could have avoided making this distinction had it merely ended its analysis after finding the underlying claim tort-like.[114] Therefore, Circuit Judge Trott disagreed with the majority's application of the *Hawkins* test to ADEA liquidated damages, but concurred that section 104(a)(2) should exclude these damages.[115]

In the Seventh Circuit, in *Downey v. Commissioner*, Burns Downey received $120,000, divided equally between back pay and liquidated damages, from United Airlines as settlement of an age discrimination claim against his former employer.[116] He and his wife reported only the back pay portion of the settlement on their joint federal income tax return and excluded the liquidated damages portion of the settlement.[117] The Commissioner claimed the entire award was taxable and filed a deficiency in the amount owed as tax on the liquidated damages.[118] The Downeys filed a petition in the Tax Court, claiming an exception for both the liquidated damages and back pay portions of the settlement.[119] In its final opinion, the Tax Court held that the ADEA "evidenced a tort-like conception of injury and remedy" for purposes of *Burke*, and that the Downeys could exclude all of their damages from gross income.[120] The Commissioner appealed to the Seventh Circuit.[121]

The Seventh Circuit followed *Burke* in overturning the Tax Court's decision by focusing its analysis on the nature of ADEA damages.[122] The court interpreted the rule of *Burke* as requiring that a statute

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[111] *Id.* at 798, 65 Fair Empl. Prac. Cas. (BNA) at 1201.

[112] *Schmitz*, 34 F.3d at 798, 65 Fair Empl. Prac. Cas. (BNA) at 1201.

[113] *Id.* Under Ninth Circuit law, ADEA liquidated damages do not compensate for the loss of the use of money, emotional distress, or pain and suffering. *Id.*

[114] *See id.* at 797, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[115] *Id.* at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[116] 33 F.3d 836, 837, 65 Fair Empl. Prac. Cas. (BNA) 1192, 1192 (7th Cir. 1994).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Downey*, 33 F.3d at 837, 65 Fair Empl. Prac. Cas. (BNA) at 1192.

[122] *See id.* at 839, 65 Fair Empl. Prac. Cas. (BNA) at 1194.

provide compensatory damages for traditional elements of personal injury, such as pain and suffering or emotional distress, in order to constitute a tort-like personal injury and receive tax exempt treatment under section 104(a)(2).[123] It noted that litigants under the ADEA cannot recover the broad range of compensatory damages that characterize tort-like causes of action, but instead are limited to only back pay and liquidated damages.[124] Therefore, the court reasoned, unless ADEA liquidated damages compensate for the traditional elements of a tort-like injury, it would be bound by *Burke* to hold that section 104(a)(2) does not exclude ADEA damages.[125]

The Seventh Circuit noted that courts of appeals have split over whether ADEA liquidated damages are punitive or contractual but concluded that whatever the appropriate characterization, ADEA liquidated damages do not compensate for the traditional elements of a personal injury claim.[126] Thus, the court held that section 104(a)(2) does not exclude such damages from gross income.[127]

In light of the Supreme Court's holding in *Burke* that section 104(a)(2) does not exclude back pay awards received in settlement of Title VII claims, the ruling of *Downey* is more sound than the ruling of *Schmitz*.[128] *Burke* clarified what constitutes a tort-like cause of action for the purposes of section 104(a)(2).[129] Following *Burke*, a court may not base its determination solely on the underlying injury which a statute seeks to redress.[130] Instead, a court must examine the remedial scheme of the statute to determine if it provides compensation for traditional elements of personal injury, such as emotional distress or pain and suffering.[131]

The Seventh Circuit, in *Downey*, applied the *Burke* rule accurately and held that the ADEA is not tort-like and, therefore, a taxpayer may not exclude from gross income damages received thereunder.[132] The remedial scheme under the ADEA provides only for awards of back pay, and in the cases of willful violations, liquidated damages.[133] The

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[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Downey*, 33 F.3d at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1194–95 (7th Cir. 1994).

[127] *Id.* at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195.

[128] *See* United States v. Burke, 112 S. Ct. 1867, 1874, 58 Fair Empl. Prac. Cas. (BNA) 1323, 1329 (1992).

[129] *See id.* at 1870–71, 58 Fair Empl. Prac. Cas. (BNA) at 1326.

[130] *See id.* at 1872, 58 Fair Empl. Prac. Cas. (BNA) at 1327.

[131] *See id.*

[132] *See* Downey v. Commissioner, 33 F.3d 836, 840, 65 Fair Empl. Prac. Cas. (BNA) 1192, 1195 (7th Cir. 1994).

[133] *See id.* at 839, 65 Fair Empl. Prac. Cas. (BNA) at 1194.

Downey court correctly concluded that neither type of award compensates the victim for the traditional elements of personal injury required under *Burke*.[134] An award of back pay merely compensates the victim for wages and benefits that he or she would have received but for the employer's discrimination.[135] Liquidated damages have been characterized by circuit courts as either punitive or contractual,[136] but in any event do not compensate for the traditional elements of personal injury such as pain and suffering or emotional distress.[137]

Regardless of its inaccurate application of the *Burke* holding, the Ninth Circuit's holding in *Schmitz* presents problems in light of that circuit's conclusions in *Hawkins*.[138] As Circuit Judge Trott notes in his concurrence in *Schmitz*, liquidated damages resemble punitive damages because they are only available in cases of willful violations of the ADEA.[139] Thus, ADEA liquidated damages fail part two of the *Hawkins* test, which requires that even after a finding of a tort-like cause of action, the damages must have been awarded "on account of" personal injury for section 104(a)(2) to apply.[140] Punitive damages by definition punish the tortfeasor, rather than compensate the victim for traditional elements of personal injury.[141] Therefore, the Ninth Circuit erred not only by misapplying the holding in *Burke* to find that the ADEA creates a tort-like cause of action, but also in characterizing ADEA liquidated damages as compensatory rather than punitive.[142]

In summary, the Ninth Circuit, in *Schmitz*, and the Seventh Circuit, in *Downey*, split over whether section 104(a)(2) excludes ADEA damage awards from gross income.[143] The Ninth Circuit, applying the two-part test it created in *Hawkins*, held that the ADEA created a tort-like cause of action and that taxpayers may exclude ADEA liquidated damages from gross income because they are received "on account of" personal injury.[144] In contrast, the Seventh Circuit, applying *Burke*, held that ADEA damages do not compensate for the intangible ele-

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[134] *See id.* at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195.

[135] *See Burke*, 112 S. Ct. at 1873, 58 Fair Empl. Prac. Cas. (BNA) at 1328 (referring to back pay awards under Title VII).

[136] *See Downey*, 33 F.3d at 839, 65 Fair Empl. Prac. Cas. (BNA) at 1194.

[137] *See id.* at 839, 65 Fair Empl. Prac. Cas. (BNA) at 1195.

[138] *See* Hawkins v. United States, 30 F.3d 1077, 1084 (9th Cir. 1994).

[139] Schmitz v. Commissioner, 34 F.3d 790, 797, 65 Fair Empl. Prac. Cas. (BNA) 1195, 1201 (9th Cir. 1994).

[140] *See id.* at 792, 65 Fair Empl. Prac. Cas. (BNA) at 1196.

[141] *Id.* at 798, 65 Fair Empl. Prac. Cas. (BNA) at 1202.

[142] *See id.* at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

[143] *See Schmitz*, 34 F.3d at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200; Downey v. Commissioner, 33 F.3d 836, 840, 65 Fair Empl. Prac. Cas. (BNA) 1192, 1195 (7th Cir. 1994).

[144] *Schmitz*, 34 F.3d at 796, 65 Fair Empl. Prac. Cas. (BNA) at 1200.

ments of personal injury and taxpayers may not exclude them under section 104(a)(2).[145]

IV. GENDER DISCRIMINATION

A. **Sexual Harassment—Shifting the Focus Away from the Victim's Response and Searching for a Standard of Employer Liability:* Karibian v. Columbia University[1]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits an employer from discriminating against an employee on the basis of gender.[2] Sexual harassment in the workplace falls within the purview of Title VII and constitutes employment discrimination.[3] A plaintiff may bring a claim of sexual harassment under two theories: (1) quid pro quo and (2) hostile work environment.[4] Quid pro quo sexual harassment occurs when an employer conditions employment decisions upon an employee's submission to or rejection of unwelcome sexual advances.[5] Sexual harassment under a hostile work environment theory arises when unwelcome sexual conduct, including comments, gestures or physical contact, is sufficiently pervasive to alter the employee's condition of employment and create an abusive environment.[6]

Prior to the *Survey* year, the United States Court of Appeals for the Second Circuit asserted that the plaintiff must establish actual economic damages in a quid pro quo sexual harassment claim.[7] Additionally, although most courts agree that an employer is held strictly liable for damages in quid pro quo cases, the standard for imputing

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[145] *Downey*, 33 F.3d at 840, 65 Fair Empl. Prac. Cas. (BNA) at 1195.

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[1] 14 F.3d 773, 63 Fair Empl. Prac. Cas. (BNA) 1038 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

[2] 42 U.S.C. § 2000e-2(a)(1) (1988). Title VII states, in part, that it shall be an unlawful employment practice for an employer to discriminate against any individual with respect to terms, conditions or privileges of employment because of such individual's sex. *Id.*

[3] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1826 (1986). The Court reasserted that position when it issued its 1993 decision in *Harris v. Forklift Sys., Inc.* *See* 114 S. Ct. 367, 370, 63 Fair Empl. Prac. Cas. (BNA) 225, 227 (1993).

[4] *Meritor*, 477 U.S. at 65–66, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

[5] *E.g.*, *Karibian*, 14 F.3d at 777, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[6] *See, e.g.*, *Meritor*, 477 U.S. at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

[7] *See, e.g.*, Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62, 58 Fair Empl. Prac. Cas. (BNA) 310, 312 (2d Cir. 1992); Carrero v. New York City Hous. Auth., 890 F.2d 569, 577, 51 Fair Empl. Prac. Cas. (BNA) 596, 602 (2d Cir. 1989).

liability to an employer in hostile work environment cases remains unclear.[8]

In 1986, the United States Supreme Court, in *Meritor Savings Bank v. Vinson*, first held that a complaint of sexual harassment based on a hostile work environment theory stated a claim under Title VII.[9] In *Meritor*, the plaintiff sued her former employer, alleging that her branch manager sexually harassed her during her employment by coercing her into multiple occurrences of sexual intercourse.[10] The plaintiff argued that the intercourse was coercive because she feared she would lose her job if she did not consent.[11] The plaintiff, however, never notified the bank of the alleged harassment despite the employer's express policy against discrimination.[12] The *Meritor* Court recognized the plaintiff's claim of a hostile work environment despite the plaintiff's failure to prove economic damages.[13] The Court asserted that Title VII and the Equal Employment Opportunity Commission ("EEOC") guidelines regarding sexual harassment do not require proof of actual or tangible damages.[14] The Court reasoned that the use of the phrase "terms, conditions or privileges of employment" in 42 U.S.C. § 2000–e–2(a)(1) evidenced Congress's intent to address all types of unequal treatment of men and women in the workplace and not just those that included actual economic loss.[15] Thus, the Court held the alleged conduct actionable under Title VII because its pervasiveness sufficiently altered the plaintiff's working environment and created an abusive atmosphere.[16]

The *Meritor* Court, however, failed to issue a clear standard for employer liability in hostile work environment cases.[17] Refusing to hold all employers absolutely liable for all cases of sexual harassment by their supervisors, the Court stated that the extent of an employer's liability will depend on the particular employment relationship and the

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[8] *See, e.g.*, *Meritor*, 477 U.S. at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829; *Karibian*, 14 F.3d at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[9] *Meritor*, 477 U.S. at 73, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

[10] *Id.* at 60, 40 Fair Empl. Prac. Cas. (BNA) at 1824.

[11] *Id.*

[12] *Id.* at 61, 40 Fair Empl. Prac. Cas. (BNA) at 1824. The plaintiff argued that she constructively notified the bank of sexual harassment because she informed her supervisor that his sexual advances were unwelcome. *See id.* at 70, 40 Fair Empl. Prac. Cas. (BNA) at 1828.

[13] *Id.* at 67–68, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

[14] *Meritor*, 477 U.S. at 64–65, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

[15] *Id.* at 64, 40 Fair Empl. Prac. Cas. (BNA) at 1826.

[16] *Id.* at 67, 40 Fair Empl. Prac. Cas. (BNA) at 1827.

[17] *See id.* at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829; Karibian v. Columbia Univ., 14 F.3d 773, 779, 63 Fair Empl. Prac. Cas. (BNA) 1038, 1043 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

job requirements of the alleged harasser in light of general agency principles.[18] Thus, the *Meritor* Court held that employers are not strictly liable in hostile work environment cases.[19]

In 1989, in *Carrero v. New York City Housing Authority*, the United States Court of Appeals for the Second Circuit held that the plaintiff stated a valid quid pro quo claim of sexual harassment because her supervisor denied tangible job benefits after she rejected his sexual demands.[20] In *Carrero*, the plaintiff's supervisor subjected her to repeated sexual advances.[21] After the plaintiff complained and her employer commenced official action to remedy the harassment, the plaintiff's supervisor began evaluating her work as unsatisfactory, and ultimately demoted her.[22] Based on these facts, the Second Circuit concluded that the plaintiff's supervisor denied the plaintiff tangible job benefits, including impartial training and evaluation, as an adverse consequence of her rejection.[23] Because the plaintiff established that her supervisor had predicated tangible job benefits on acceptance of his sexual demands, the court held that the plaintiff stated a valid quid pro quo claim.[24]

In 1990, in *Hirschfeld v. New Mexico Corrections Department*, the United States Court of Appeals for the Tenth Circuit declined to hold the employer liable for an employee's hostile work environment sexual harassment because the employee was not acting within his scope of

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[18] *Meritor*, 477 U.S. at 71–72, 40 Fair Empl. Prac. Cas. (BNA) at 1829. Thus, the Court reasoned that Congress intended to limit the acts of employees for which an employer is liable under Title VII by defining employer to include any of its agents in 42 U.S.C. § 2000(e)(b). *Id.* at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

The *Meritor* Court also noted inconsistency between the EEOC guidelines on sexual harassment and the EEOC's amicus curiae brief. *Id.* at 71, 40 Fair Empl. Prac. Cas. (BNA) at 1829. The EEOC Guidelines impose liability on an employer for the acts of its agents without regard to the employer's notice. 29 C.F.R. § 1604.11(c) (1994). The EEOC argued in its brief, however, that an employee's failure to take advantage of an established procedure for filing sexual harassment complaints insulates the employer from liability unless the employer had actual knowledge of a sexually hostile work environment. *Meritor*, 477 U.S. at 71, 40 Fair Empl. Prac. Cas. (BNA) at 1828–29.

[19] *Meritor*, 477 U.S. at 73, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

[20] 890 F.2d 569, 579, 51 Fair Empl. Prac. Cas. (BNA) 596, 603 (2d Cir. 1989). The Second Circuit concluded that the district court correctly predicated the employer's liability on the quid pro quo claim despite the existence of hostile work environment elements. *See id.*

[21] *Id.* at 573, 51 Fair Empl. Prac. Cas. (BNA) at 598.

[22] *Id.* at 573–74, 51 Fair Empl. Prac. Cas. (BNA) at 598–99. Prior to the employer's report on the alleged harassment, the supervisor's evaluation rated the plaintiff as satisfactory. *Id.* at 574, 51 Fair Empl. Prac. Cas. (BNA) at 599.

[23] *Id.* at 579, 51 Fair Empl. Prac. Cas. (BNA) at 603.

[24] *See id.* The Second Circuit recognized that the plaintiff was, in part, denied tangible job benefits because of a hostile work environment. *See id.* Moreover, the court stated that many sexual harassment cases will not fit neatly into one category or the other. *Id.*

employment or on behalf of the employer and the employer took prompt remedial action upon notice.[25] In *Hirschfeld*, a correctional officer sexually harassed the plaintiff, a secretary and co-worker, by making unwelcome attempts to kiss and hug her.[26] The Tenth Circuit concluded that the harassing employee was not acting within the scope of his employment when he sexually accosted the plaintiff.[27]

Additionally, the Tenth Circuit determined that the employer immediately took adequate remedial action once informed of the alleged harassment.[28] Furthermore, the Tenth Circuit concluded that the correctional officer did not purport to act on behalf of the employer and the agency relationship did not aid in his furtherance of the sexual harassment.[29] Thus, the Tenth Circuit declined to hold the employer liable for its supervisor's hostile work environment sexual harassment because the supervisor perpetrated the harassment neither within the scope of his employment, nor on behalf of the employer, and because the employer properly remedied the problem.[30]

In 1992, in *Kotcher v. Rosa and Sullivan Appliance Center, Inc.*, the United States Court of Appeals for the Second Circuit held that the employer is not liable in a hostile work environment case unless it failed to either provide a reasonable avenue for complaint or respond upon notice of sexual harassment.[31] In *Kotcher*, the plaintiffs' supervisor allegedly subjected the plaintiffs to multiple episodes of vulgar comments and gestures.[32] Once notified of the harassment, the employer immediately started an investigation and transferred and demoted the harassing supervisor.[33] The Second Circuit reasoned that an employer neither tolerates nor condones a sexually abusive work environment if it provides the necessary procedures to file a harassment complaint and acts promptly and adequately upon notice of harass-

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[25] 916 F.2d 572, 577–80, 54 Fair Empl. Prac. Cas. (BNA) 268, 272–74 (10th Cir. 1990).

[26] *Id.* at 574, 54 Fair Empl. Prac. Cas. (BNA) at 269–70.

[27] *Id.* at 577, 54 Fair Empl. Prac. Cas. (BNA) at 272.

[28] *Id.* at 577–78, 54 Fair Empl. Prac. Cas. (BNA) at 272–73. The employer immediately conducted an investigation, and upon confirmation of the harassment, demoted the correctional officer. *Id.* at 577, 54 Fair Empl. Prac. Cas. (BNA) at 272.

[29] *Id.* at 579–80, 54 Fair Empl. Prac. Cas. (BNA) at 274.

[30] *See Hirschfeld*, 916 F.2d at 577–80, 54 Fair Empl. Prac. Cas. (BNA) at 272–74.

[31] 957 F.2d 59, 63, 58 Fair Empl. Prac. Cas. (BNA) 310, 312–13 (2d Cir. 1992). The Second Circuit did not refute the district court's determination that the employer's response to the complaint was sufficient. *Id.* at 63, 58 Fair Empl. Prac. Cas. (BNA) at 313. The Second Circuit, however, expressed reservation that the employer's response was perhaps a sham and remanded the case for further factual findings. *Id.*

[32] *Id.* at 61, 58 Fair Empl. Prac. Cas. (BNA) at 311.

[33] *Id.* at 62, 58 Fair Empl. Prac. Cas. (BNA) at 311.

ment.[34] Thus, the *Kotcher* court held that the employer is not liable in a hostile work environment case for the acts of its supervisors, unless the employer fails to provide a reasonable procedure for employer notification or fails to remedy the harassment once notified.[35]

In 1992, in *Kauffman v. Allied Signal, Inc.*, the United States Court of Appeals for the Sixth Circuit held an employer not liable for its supervisor's creation of a sexually hostile environment, despite the supervisor's use of apparent authority to perpetrate the harassment, because the employer responded adequately and promptly after notice of the harassment.[36] In *Kauffman*, the plaintiff's supervisor repeatedly commented about and attempted to touch the plaintiff's breasts.[37] The employer terminated the supervisor within a day of receiving notice of the harassment.[38] In addition, the employer had a written policy against sexual harassment and encouraged use of its grievance procedure.[39]

The *Kauffman* court rejected the employer's argument for application of the respondeat superior standard to determine employer liability.[40] The Sixth Circuit noted that such a standard applied to co-worker, rather than supervisor-employee, harassment cases.[41] The Sixth Circuit asserted that the initial question was whether the harassment took place within the scope of the supervisor's employment.[42] Even if it had, the *Kauffman* court concluded that the employer would still insulate itself from liability if it responded adequately upon notice of the harassment.[43] The Sixth Circuit reasoned that this standard for employer liability fits more consistently with the purpose of Title VII, which defines "employer" as including any of its agents.[44] Thus, the *Kauffman* court held that although the supervisor's harassment was within the scope of his employment, the employer's immediate dismiss-

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[34] *See id.* at 63, 58 Fair Empl. Prac. Cas. (BNA) at 312–13.

[35] *See id.*

[36] 970 F.2d 178, 184, 59 Fair Empl. Prac. Cas. (BNA) 606, 611 (6th Cir. 1992).

[37] *Id.* at 180–81, 59 Fair Empl. Prac. Cas. (BNA) at 608.

[38] *Id.* at 181, 59 Fair Empl. Prac. Cas. (BNA) at 608.

[39] *Id.* The plaintiff testified that she knew nothing of the employer's sexual harassment policy and had never seen a copy of it displayed on the premises' bulletin boards or message centers. *Id.*

[40] *Id.* at 183, 59 Fair Empl. Prac. Cas. (BNA) at 610. The respondeat superior standard requires the plaintiff to prove that the employer knew or should have known of the harassment and failed to respond adequately. *Id.* (quoting Rabidue v. Osceola Ref. Co., 805 F.2d 611, 621, 42 Fair Empl. Prac. Cas. (BNA) 631, 638 (6th Cir. 1986)).

[41] *Kauffman*, 970 F.2d at 183, 59 Fair Empl. Prac. Cas. (BNA) at 610.

[42] *Id.* at 184, 59 Fair Empl. Prac. Cas. (BNA) at 611.

[43] *Id.*

[44] *Id.*

al of him upon notice of the harassment exhibited sufficient response to absolve the employer of liability.[45]

During the *Survey* year, in *Karibian v. Columbia University*, the United States Court of Appeals for the Second Circuit held that actual economic loss is not required by Title VII to state a valid quid pro quo claim of sexual harassment.[46] The *Karibian* court also held that when a supervisor uses actual or apparent authority to facilitate acceptance of his sexual advances by a subordinate, the employer is strictly liable by virtue of the supervisor's use of the existing agency relationship.[47] In *Karibian*, the plaintiff's supervisor allegedly forced her to consent to a sexual relationship by threatening loss of certain job benefits.[48] Addressing the quid pro quo claim, the Second Circuit reasoned that requiring actual economic damages focuses too much on the harassed employee's reaction to sexual advances.[49] According to the court, the relevant question instead should be whether a supervisor predicated a tangible employment benefit on the acceptance by an employee of that supervisor's sexual advances.[50] As to the second issue, the *Karibian* court observed that holding an employer strictly liable under a quid pro quo theory when a supervisor used the existing agency relationship to facilitate sexual harassment, but not holding the employer liable in the same circumstances under a hostile work environment theory represented an inconsistency.[51] Thus, the court held that when a supervisor uses his or her actual or apparent authority to perpetrate sexual harassment, the employer is absolutely liable.[52]

In *Karibian*, the plaintiff's supervisor, Mark Urban ("Urban"), allegedly coerced the plaintiff, an employee of Columbia University ("Columbia"), into a sexual relationship by telling her that she "owed him" for all that he did for her.[53] The plaintiff alleged that she acquiesced to Urban's demands because she feared she might lose her job if she refused.[54] The relationship lasted at least fifteen months before the plaintiff officially notified Columbia of Urban's alleged harass-

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[45] *Id.*

[46] 14 F.3d 773, 778, 63 Fair Empl. Prac. Cas. (BNA) 1038, 1042 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994).

[47] *Id.* at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

[48] *Id.* at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1040.

[49] *Id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[50] *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[51] *Karibian*, 14 F.3d at 781, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[52] *Id.* at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

[53] *Id.* at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1040.

[54] *Id.*

ment.[55] Columbia forced Urban to resign shortly thereafter.[56] Several months later, the plaintiff filed a Title VII sexual harassment claim in the United States District Court for the Southern District of New York.[57]

The Second Circuit addressed the quid pro quo and hostile work environment claims separately.[58] First, the *Karibian* court reversed the district court's dismissal of the quid pro quo claim, holding that a plaintiff need only show that an employment term was conditioned upon submission to an unwelcome sexual advance to establish a quid pro quo claim of sexual harassment.[59] Relying on *Meritor*, the Second Circuit commented that actual loss is not a prerequisite of a quid pro quo claim because neither Title VII nor the EEOC guidelines limit Title VII claims to those involving economic or tangible discrimination.[60] The Second Circuit reasoned that requiring actual economic damages incorrectly emphasized the reaction of the harassed employee instead of the conduct of the alleged harasser.[61] Thus, the Second Circuit held that quid pro quo sexual harassment occurs whenever the complainant's supervisor links tangible job benefits to the acceptance or rejection of sexual demands.[62]

In so holding, the Second Circuit rejected Columbia's argument that *Kotcher* and *Carrero* require the plaintiff to demonstrate actual economic loss.[63] The Second Circuit concluded that Columbia improp-

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[55] *See id.* at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1040–41. On two separate occasions during the relationship with Urban, the plaintiff indicated to counselors working for Columbia that she feared retaliation from Urban if she rejected him. *Id.* at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1040. Columbia started no investigation, however, because the plaintiff requested confidentiality from the counselors. *Id.* The university was not officially informed until fifteen months after Karibian first met with Columbia's counselors when the plaintiff confronted a director of her department about her concerns that Urban would fire her. *Id.* at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1041.

[56] *Karibian*, 14 F.3d at 776, 63 Fair Empl. Prac. Cas. (BNA) at 1041. Once notified, Columbia officials confronted Urban, who asserted that the relationship was completely consensual. *Id.* Although Columbia never opined on the credibility of either party's characterization of the relationship, the university forced Urban to resign for undisclosed reasons. *Id.*

[57] *Id.* The district court dismissed the plaintiff's quid pro quo claim because she failed to establish an actual economic loss resulting from the sexual advances made towards her. Karibian v. Columbia Univ., 812 F. Supp. 413, 416, 61 Fair Empl. Prac. Cas. (BNA) 66, 68 (S.D.N.Y. 1993), *rev'd*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994). The district court also addressed the hostile work environment theory. *See infra* note 71 and accompanying text.

[58] *Karibian*, 14 F.3d at 777, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[59] *Id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) 1043.

[60] *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[61] *Id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043. The court of appeals further stated that requiring actual economic damages would unfairly punish those victims of sexual harassment who do not successfully resist unwelcome sexual advances. *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[62] *Id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[63] *Karibian*, 14 F.3d at 778–79, 63 Fair Empl. Prac. Cas. (BNA) at 1042–43.

erly relied on *Kotcher* because *Kotcher* involved a hostile work environment claim and thus, the court considered any dicta therein regarding quid pro quo claims not binding.[64] The Second Circuit conceded that *Carrero* was a quid pro quo case.[65] The Second Circuit, however, factually distinguished *Carrero* from *Karibian* because the *Carrero* plaintiff refused her supervisor's advances, while the *Karibian* plaintiff submitted.[66] The *Karibian* court commented that, in refusal cases like *Carrero*, the plaintiff can usually show adverse consequences and actual economic loss as a result of refusing to acquiesce to sexual demands.[67] The Second Circuit asserted, however, that adverse employment decisions should not be required in every case of quid pro quo harassment because such a requirement focuses undue attention on the victim's response instead of the harasser's conduct.[68] The Second Circuit held that the focus in a quid pro quo sexual harassment claim should be on whether an employment term was conditioned upon an employee's submission to an unwelcome sexual advance.[69] Thus, the Second Circuit concluded that if Urban predicated favorable work assignments, raises and promotions on the plaintiff's continued acquiescence to his sexual advances, he committed quid pro quo sexual harassment.[70]

The Second Circuit also reversed the district court's hostile work environment ruling in favor of Columbia.[71] The Second Circuit held that an employer is strictly liable in a hostile work environment case if the employer's supervisor uses actual or apparent authority to facilitate the harassment or if the agency relationship between employer and supervisor aided the harassment.[72] The Second Circuit acknowledged

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[64] *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1043. In *Kotcher*, the court of appeals had stated that a plaintiff in a quid pro quo case must establish that she rejected a sexual advance by her supervisor, and was therefore denied an actual economic benefit. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62, 58 Fair Empl. Prac. Cas. (BNA) 310, 312 (2d Cir. 1992).

[65] *Karibian*, 14 F.3d at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[66] *See id.*

[67] *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) 1042–43. The Second Circuit therefore concluded the *Karibian* decision was not inconsistent with the *Carrero* standard. *Id.* at 778–79, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[68] *Id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[69] *Id.* at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[70] *Karibian*, 14 F.3d at 778, 63 Fair Empl. Prac. Cas. (BNA) at 1042.

[71] *See id.* at 779–80, 63 Fair Empl. Prac. Cas. (BNA) at 1043–44. Relying on *Kotcher*, the district court dismissed the plaintiff's hostile work environment claim because she could not prove that Columbia failed to either provide a reasonable avenue for complaint or act upon notice of the harassment. *See* Karibian v. Columbia Univ., 812 F. Supp. 413, 416, 61 Fair Empl. Prac. Cas. (BNA) 66, 68 (S.D.N.Y. 1993) (quoting *Kotcher*, 957 F.2d at 63, 58 Fair Empl. Prac. Cas. (BNA) at 312), *rev'd*, 14 F.3d 773 (2d Cir.), *cert. denied*, 114 S. Ct. 2693 (1994). The district court rejected the plaintiff's argument that she notified Columbia when she had her confidential meetings with the university's counselors about Urban's conduct. *Id.* at 416–17, 61 Fair Empl. Prac. Cas. (BNA) at 68.

[72] *Karibian*, 14 F.3d at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

that courts have consistently held the employer strictly liable in quid pro quo cases.[73] When decisions made by a supervisor affect the economic status of an employee, the supervisor acts on behalf of the employer, and the supervisor and the employer become the same entity in the employee's perspective.[74] According to the Second Circuit, holding Columbia strictly liable for quid pro quo harassment but not holding it liable when the same conduct created a hostile work environment claim created a jarring anomaly.[75]

The Second Circuit rejected Columbia's argument that it could not be liable under a hostile work environment claim because it satisfied the *Kotcher* standard by providing proper complaint procedures and acting promptly upon notice.[76] The Second Circuit stated that conforming to the *Kotcher* requirements does not automatically shield the employer from liability.[77] More specifically, the *Karibian* court quoted *Kotcher* itself to show that the *Kotcher* standard should not necessarily apply in all cases.[78] The Second Circuit distinguished *Kotcher* from *Karibian* by likening the *Kotcher* facts to co-worker harassment.[79] The Second Circuit indicated that agency principles protected employers from liability in those co-worker cases absent notice or failure to act upon notice because the harasser uses neither actual nor apparent authority to perpetrate sexual harassment.[80] In contrast, the *Karibian* court noted that the plaintiff in the instant case alleged that the supervisor did use actual or apparent authority to create a hostile work environment.[81]

Relying on *Hirschfeld* and the Restatement (Second) of Agency, the Second Circuit concluded that an employer is absolutely liable if one of its supervisors uses delegated authority to create a discriminatorily abusive work environment under common law principles of agency.[82]

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[73] *Id.*; *see also Kotcher*, 957 F.2d at 62, 58 Fair Empl. Prac. Cas. (BNA) at 312; Carrero v. New York City Hous. Auth., 890 F.2d 569, 579, 51 Fair Empl. Prac. Cas. (BNA) 596, 603 (2d Cir. 1989).

[74] *Karibian*, 14 F.3d at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044–45 (quoting *Kotcher*, 957 F.2d at 62, 58 Fair Empl. Prac. Cas. (BNA) at 312). The *Karibian* court also cited *Carrero*. *Id.*, 63 Fair Empl. Prac. Cas. (BNA) at 1044 (citing 890 F.2d at 579, 51 Fair Empl. Prac. Cas. (BNA) at 603 (when harasser holds out employer's benefits as incentive to acquiesce to sexual demands, he or she acts as and on behalf of company)).

[75] *Karibian*, 14 F.3d at 781, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[76] *Id.*

[77] *Id.* at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

[78] *See id.*

[79] *See id.* at 781, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[80] *Karibian*, 14 F.3d at 781, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[81] *See id.* at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

[82] *Id.* (citing Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577–80, 54 Fair Empl. Prac. Cas. (BNA) 268, 272–74 (10th Cir. 1990); RESTATEMENT (SECOND) OF AGENCY § 219(1), (2)(d) (1958).

Thus, the Second Circuit held that the employer should be subject to absolute liability because the plaintiff's supervisor used actual or apparent authority to create the sexually hostile work environment.[83]

The *Karibian* decision attempts to minimize the importance of whether a sexual harassment victim consents to or rejects sexual advances by an alleged harasser.[84] By instead emphasizing whether the sexual advances were unwelcome by the victim, *Karibian* refutes *Kotcher*'s requiring a plaintiff to show a denial of tangible job benefits as a consequence of rejecting sexual advances made by the harasser.[85] Furthermore, *Karibian* strikes a more equitable balance in the burdens borne by the harasser and the victim by not requiring proof of actual damages. Otherwise, as implied by the *Karibian* court, when the victim consents to the sexual advances and thereby avoids adverse employment decisions, the victim is automatically presumed to have welcomed the sexual advances in question.[86]

The *Karibian* decision, however, possibly creates different standards for refusal and consent cases with respect to actual versus threatened damages. The Second Circuit stated that *Karibian* was consistent with *Carrero* because the *Carrero* language is limited to refusal-type cases.[87] *Carrero* required that the plaintiff establish adverse consequences as a result of rejection of the supervisor's unwelcome sexual advances.[88] Thus, *Karibian* could be interpreted as still requiring plaintiffs in refusal cases to show actual damages. Under such an interpretation, the Second Circuit treats a victim in a refusal case differently than a victim who consents to unwelcome sexual advances. Contrary to the theme of *Karibian*, the focus consequently shifts from the issue of whether the sexual advances were unwelcome back to whether the victim rejected or consented to the sexual advances in order to determine if the plaintiff must establish actual damages.

The *Karibian* decision initially may be lauded for clearly establishing that strict liability be imposed on the employer when a supervisor uses actual or apparent authority in creating a sexually abusive environment.[89] By following a strict liability standard similar to that applied by the Tenth Circuit in *Hirschfeld*, an employer may not avoid

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[83] *Id.*

[84] *See id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[85] *See Karibian*, 14 F.3d at 778–79, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[86] *See id.* at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1045.

[87] *Id.* at 778–79, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[88] Carrero v. New York City Hous. Auth., 890 F.2d 569, 579, 51 Fair Empl. Prac. Cas. (BNA) 596, 603 (2d Cir. 1989).

[89] *See Karibian*, 14 F.3d at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044; Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577–80, 54 Fair Empl. Prac. Cas. (BNA) 268, 272–74 (10th Cir. 1990).

liability by responding promptly and adequately to a sexual harassment complaint.[90] Consequently, institution of a strict liability standard in supervisor-created hostile work environment cases may create an even greater incentive for employers to provide proactive devices to spot and prevent sexual harassment before it occurs.

The *Karibian* decision may, however, ultimately face substantial criticism. First, *Karibian* places an extremely onerous burden on the employer. The employer has virtually no way to protect itself under *Karibian* if a supervisor creates a sexually hostile environment.[91] This seems particularly unfair given the sometimes covert and subtle nature of hostile work environment sexual harassment.

Second, *Karibian* may further motivate employers to cover up incidents of sexually abusive environments because of the resulting legal liability. *Karibian*'s strict liability standard, making an employer's response to harassment complaints irrelevant, impels the employer to hinder an employee's attempt to seek redress for a reported incident of hostile work environment sexual harassment.[92] The employer may decide that responding appropriately will cost more than covering up reported sexual harassment or hindering an employee's attempt to sue.[93] Thus, instead of responding quickly and adequately, employers may opt to cover up incidents of sexual harassment.

As an alternative to the *Karibian* decision, the *Kauffman* standard used by the Sixth Circuit may further the purposes of Title VII more effectively. Unlike the strict liability standard, the *Kauffman* standard motivates the employer to respond promptly and adequately to complaints of sexually abusive work environments because by doing so, the employer avoids Title VII liability.[94] Thus, the employer has no incentive to cover up supervisor-created hostile work environment harassment. Moreover, the *Kauffman* standard does not affect the employer's incentive to take proactive measures in preventing sexual harassment. In enacting Title VII, Congress intended to strike at the entire spectrum of unequal treatment of men and women in the workplace.[95]

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[90] *See Karibian*, 14 F.3d at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

[91] *See id.*

[92] *See generally id.* at 780–81, 63 Fair Empl. Prac. Cas. (BNA) at 1044–45.

[93] Although outside the scope of this Note, the prospect of punitive damages may provide a disincentive to an employer's decision not to respond accordingly. The employer, however, may view the potential of punitive damages as merely another factor in its cost-benefit analysis regarding how to properly respond to a sexual harassment complaint. Thus, the possibility still exists that the employer will perceive the risk of punitive damages as less costly than the prospect of strict liability and will decide to cover up rather than remedy complaints of sexual harassment.

[94] Kauffman v. Allied Signal, Inc., 970 F.2d 178, 184, 59 Fair Empl. Prac. Cas. (BNA) 606, 611 (6th Cir. 1992).

[95] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64, 40 Fair Empl. Prac. Cas. (BNA) 1822, 1826 (1986).

Giving an employer incentive to cover up sexual harassment does not satisfy such intent.

The United States Supreme Court avoided issuing a clear standard for employer liability in hostile work environment cases in *Meritor* in 1986.[96] As a result, lower courts are split on when and if strict liability should apply.[97] Regardless of which hostile work environment standard better suits the purposes of Title VII, the United States Supreme Court must intervene and establish a consistent standard on this issue.

In summary, the Second Circuit in *Karibian* held that where an employee submits to unwelcome sexual demands of a supervisor, the plaintiff need not establish actual, rather than threatened, economic damages in a quid pro quo sexual harassment claim.[98] *Karibian*, however, may still be interpreted as requiring that actual damages be proven when a plaintiff rejects sexual advances of his or her supervisor. The Second Circuit also held in *Karibian* that an employer is strictly liable for a hostile work environment created by its supervisor if that supervisor used actual or apparent authority to perpetrate sexual harassment.[99] Though the *Karibian* strict liability standard further motivates employers to proactively prevent hostile work environment sexual harassment, it also may give them incentive to cover up, rather than remedy, reported incidents of such harassment.

V. Pregnancy Discrimination

A. **The Pregnancy Discrimination Act:* Troupe v. May Department Stores Co.[1]

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals on the basis of race, color, religion, sex or national origin.[2] In 1978, Congress added the Pregnancy Dis-

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[96] *Id.* at 72, 40 Fair Empl. Prac. Cas. (BNA) at 1829.

[97] *See, e.g., Karibian*, 14 F.3d at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044; *Kauffman*, 970 F.2d at 184, 59 Fair Empl. Prac. Cas. (BNA) at 611; Hirschfeld v. New Mexico Corrections Dep't, 916 F.2d 572, 577–80, 54 Fair Empl. Prac. Cas. (BNA) 268, 272–74 (10th Cir. 1990).

[98] *See Karibian*, 14 F.3d at 779, 63 Fair Empl. Prac. Cas. (BNA) at 1043.

[99] *Id.* at 780, 63 Fair Empl. Prac. Cas. (BNA) at 1044.

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[1] 20 F.3d 734, 64 Fair Empl. Prac. Cas. (BNA) 512 (7th Cir. 1994).

[2] 42 U.S.C. § 2000e-2 (1988). The relevant section states in part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

Id. § 2000e-2(a)(1).

crimination Act to Title VII, clarifying that discrimination on the basis of sex includes pregnancy discrimination.[3] Because this amendment is relatively new, the courts are still testing the boundaries of pregnancy discrimination within the meaning of Title VII.[4]

In 1976, prior to the amendment of Title VII, in *General Electric Co. v. Gilbert*, the United States Supreme Court held that a disability plan, which excluded pregnancy-related disabilities from its coverage, did not discriminate against female employees.[5] General Electric offered a plan that paid sixty percent of an employee's normal earnings for non-occupational sicknesses, except those related to pregnancy.[6] The Court reasoned that the structure of the plan was not a pretext to discriminate against women.[7] First, the Court noted that because, unlike other disabilities, women usually became pregnant by choice, it was not facially discriminatory to exclude pregnancy from coverage.[8] In addition, the Court emphasized that most insurance plans covered certain risks while excluding others and that this plan covered men and women for all the same risks.[9] The Court stated that, absent evidence that the plan had more monetary value for men than for women, it could not be discriminatory.[10] Thus, the Court concluded

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[3] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 670, 32 Fair Empl. Prac. Cas. (BNA) 1, 2 (1983). The amended definition section provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . ." 42 U.S.C. § 2000e(k) (1988).

The dual purpose of this amendment was to overrule the decision made by the United States Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125, 13 Fair Empl. Prac. Cas. (BNA) 1657 (1976), and to guarantee equal treatment to pregnant women in the workplace. Sarah E. Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U. L. REV. 591, 599–600 (1982).

[4] *See, e.g.*, International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 206, 55 Fair Empl. Prac. Cas. (BNA) 365, 374 (1991); *Troupe*, 20 F.3d at 738, 64 Fair Empl. Prac. Cas. (BNA) at 515; EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 948, 58 Fair Empl. Prac. Cas. (BNA) 114, 117 (10th Cir. 1992). One author noted that in most areas of the law, discrimination has been defined by the courts "on a piecemeal basis" and predicted that the same trend would appear in pregnancy discrimination litigation. Jane Rigler, Newport News Shipbuilding & Dry Dock Co. v. EEOC *and Sex Discrimination Under Title VII: Some Questions Answered, Others Remain*, 88 DICK. L. REV. 357, 358 (1984).

[5] 429 U.S. 125, 145–46, 13 Fair Empl. Prac. Cas. (BNA) 1657, 1666 (1976).

[6] *Id.* at 128, 13 Fair Empl. Prac. Cas. (BNA) at 1659.

[7] *Id.* at 136, 13 Fair Empl. Prac. Cas. (BNA) at 1662.

[8] *Id.*

[9] *Id.* at 138, 13 Fair Empl. Prac. Cas. (BNA) at 1663.

[10] *General Electric*, 429 U.S. at 138, 13 Fair Empl. Prac. Cas. (BNA) at 1663. The Court explained that because the same disabilities were covered for all employees, the plan was equally beneficial for men and women. *Id.* If pregnancy were included, then the women would actually be receiving more benefits than the men. *See id.*

that employers who denied disability benefits for conditions related to pregnancy did not violate Title VII.[11]

In 1978, Congress passed the Pregnancy Discrimination Act ("PDA"), which provided that Title VII sex discrimination included discrimination on the basis of pregnancy and related medical conditions.[12] This amendment effectively overruled *General Electric*.[13] In 1983, in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, the United States Supreme Court held that a disability plan violated Title VII, even though it fully covered female employees.[14] The defendant amended its plan in 1979 so that all employees received the same benefits, but created a differentiation between male and female spouses of employees by limiting benefits for pregnancy-related conditions.[15] The Court began its analysis by explaining that, under the PDA, distinctions based on pregnancy are facially discriminatory.[16] Next, the Court reiterated the purpose of the PDA, to ensure the same treatment for pregnancy-related conditions as other medical conditions.[17] Thus, the Court determined that by refusing to fully insure pregnant spouses, the employer discriminated against its male employees in violation of Title VII.[18]

In 1991, in *International Union, UAW v. Johnson Controls, Inc.*, the United States Supreme Court further defined the scope of the PDA by holding that an employer could not prevent a female employee from taking a particular job to protect potential children from health risks.[19] The defendant's battery manufacturing process exposed employees to lead.[20] Because of the potential dangers to pregnant workers, the defendant instituted a policy that excluded women capable of bearing

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[11] *Id.* at 145–46, 13 Fair Empl. Prac. Cas. (BNA) at 1666.

[12] *See Newport News*, 462 U.S. at 670, 32 Fair Empl. Prac. Cas. (BNA) at 2.

[13] Wald, *supra* note 3, at 598.

[14] 462 U.S. at 685, 32 Fair Empl. Prac. Cas. (BNA) at 8.

[15] *Id.* at 672, 32 Fair Empl. Prac. Cas. (BNA) at 3. The plan paid for surgical procedures, necessary services, a semi-private room for up to 120 days, the first $750 of reasonable hospital charges including nursing care, X-rays, drugs and other services, and 80% of the cost of hospital services exceeding $750 for employees during hospital stays. *Id.* at 672 n.6, 32 Fair Empl. Prac. Cas. (BNA) at 2 n.6. The same plan was in effect for spouses, except that for pregnancy-related hospitalization, it only paid the reasonable charges for anesthesiology and delivery and up to $500 for other hospital charges. *Id.*

[16] *Id.* at 684, 32 Fair Empl. Prac. Cas. (BNA) at 7.

[17] *Id.* The court explained that because the spouses of male employees were not covered as fully as the spouses of female employees, the female employees were getting a more favorable insurance plan. *See id.* at 683, 32 Fair Empl. Prac. Cas. (BNA) at 7. This type of disparity is exactly what Congress was trying to prevent when it passed the PDA. *See id.* at 684, 32 Fair Empl. Prac. Cas. (BNA) at 7.

[18] *Id.* at 685, 32 Fair Empl. Prac. Cas. (BNA) at 8.

[19] 499 U.S. 187, 206, 55 Fair Empl. Prac. Cas. (BNA) 365, 374 (1991).

[20] *Id.* at 190, 55 Fair Empl. Prac. Cas. (BNA) at 368.

children from any work station where high levels of lead had been reported.[21] Because the policy clearly differentiated on the basis of gender, the Court explained that it would have to be based on a bona fide occupational qualification in order to satisfy the PDA.[22] The Court defined a bona fide occupational qualification as an objective standard that is relevant to an employee's ability to complete tasks essential to the job.[23] According to the Court, although an employer may legitimately prevent a pregnant employee from working if it may harm a third party, an employer may not legitimately use the safety of an employee's fetus as an excuse for not hiring a woman capable of bearing children.[24] The Court concluded that unless pregnancy actually prevented women from fulfilling their duties, an employer could not exclude them from particular positions.[25]

In 1992, in *EEOC v. Ackerman, Hood & McQueen, Inc.*, the United States Court of Appeals for the Tenth Circuit held that an employer who made accommodations for employees with medical problems in the past must make accommodations for pregnant workers as well.[26] The plaintiff, an executive secretary who usually worked overtime, became pregnant and began experiencing fatigue, nausea and headaches.[27] She gave her supervisor a doctor's note, which recommended that she work only forty hours each week.[28] After the plaintiff told her employer that she intended to follow that recommendation, the employer fired her for insubordination.[29] The court maintained that, rather than a comparison between the employer's actions toward men as opposed to women, the correct comparison was between pregnant and non-pregnant employees.[30] Because the employer had allowed non-pregnant employees to alter their schedules to accommodate medical conditions, the court reasoned that the employer treated pregnant employees differently by not allowing them to do the same.[31] Conse-

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[21] *Id.* at 191–92, 55 Fair Empl. Prac. Cas. (BNA) at 368.

[22] *See id.* at 198–200, 55 Fair Empl. Prac. Cas. (BNA) at 371–72.

[23] *See id.* at 201–03, 55 Fair Empl. Prac. Cas. (BNA) at 372–73. Thus, an employer may terminate a pregnant employee if conditions related to pregnancy might interfere with the safety of customers or other third-parties. *See id.* at 202, 55 Fair Empl. Prac. Cas. (BNA) at 372–73.

[24] *See Johnson Controls*, 499 U.S. at 202, 55 Fair Empl. Prac. Cas. (BNA) at 372.

[25] *Id.* at 206, 55 Fair Empl. Prac. Cas. (BNA) at 374.

[26] 956 F.2d 944, 948–49, 58 Fair Empl. Prac. Cas. (BNA) 114, 117–18 (10th Cir. 1992).

[27] *Id.* at 945–46, 58 Fair Empl. Prac. Cas. (BNA) at 115.

[28] *Id.* at 946, 58 Fair Empl. Prac. Cas. (BNA) at 115.

[29] *Id.*, 58 Fair Empl. Prac. Cas. (BNA) at 116.

[30] *Id.* at 948, 58 Fair Empl. Prac. Cas. (BNA) at 117.

[31] *Ackerman*, 956 F.2d at 949, 58 Fair Empl. Prac. Cas. (BNA) at 118.

quently, the court concluded that the employer's treatment of the plaintiff violated the PDA.[32]

During the *Survey* year, in *Troupe v. May Department Stores Co.*, the United States Court of Appeals for the Seventh Circuit addressed the issue of how far an employer must go to accommodate a pregnant employee.[33] The court held that Title VII allowed an employer to fire a pregnant employee who repeatedly arrived late for work, even if the employer's motivation was to save the costs of maternity leave.[34] The Seventh Circuit concluded that the PDA was not "a warrant for favoritism."[35]

The plaintiff, Kimberly Hern Troupe, began working for Lord & Taylor as a part-time saleswoman in 1987, moving to full-time work in 1990.[36] In December of 1990, Troupe requested and received a return to her part-time position because of her severe morning sickness.[37] Despite her shift to afternoon hours, Troupe continued to suffer from morning sickness and either arrived late for work or left work early on nine out of twenty-one days.[38] Her supervisor gave her a verbal warning, followed by a written warning in February of 1991.[39] After being late three consecutive days in March, Lord & Taylor placed her on probation for sixty days.[40] During her probation, Troupe arrived late eleven more days.[41] Finally, Lord & Taylor fired her on June 7, the day before she planned to begin her maternity leave.[42] At the trial, Troupe testified that her supervisor told her that the company fired her because they thought that she would not return after she had her baby.[43]

The United States District Court for the Northern District of Illinois granted the defendant's motion for summary judgment because the plaintiff failed to provide any direct evidence of discrimination.[44] In an opinion authored by Chief Circuit Judge Posner, the Seventh Circuit affirmed the decision, but rejected the district court's

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[32] *Id.* at 948–49, 58 Fair Empl. Prac. Cas. (BNA) at 118.

[33] *See* 20 F.3d 734, 738, 64 Fair. Empl. Prac. Cas. (BNA) 512, 515 (7th Cir. 1994).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 735, 64 Fair Empl. Prac. Cas. (BNA) at 513.

[37] *Id.*

[38] *Troupe*, 20 F.3d at 735, 64 Fair Empl. Prac. Cas. (BNA) at 513.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.* at 735–36, 64 Fair Empl. Prac. Cas. (BNA) at 513.

[43] *Troupe*, 20 F.3d at 735–36, 64 Fair Empl. Prac. Cas. (BNA) at 513.

[44] *Id.* at 736, 64 Fair Empl. Prac. Cas. (BNA) at 513. The court explained that the discriminatory intent of the employer or its agents would have to be clear with no need to draw inferences. *Id.*

reasoning.[45] According to the Seventh Circuit, a plaintiff may prove intentional discrimination either by direct evidence or circumstantial evidence from which inferences of discrimination could be drawn.[46] The court listed three types of circumstantial evidence that may help prove a Title VII case: 1) suspicious timing and ambiguous statements;[47] 2) evidence regarding the treatment of similarly situated employees;[48] or 3) evidence that the plaintiff was otherwise qualified and that the employer's reason for dismissal was a pretext.[49] The court recognized that although each of these types of evidence may be sufficient by itself to prove a case of intentional discrimination, a plaintiff also may present them together.[50] Noting that Troupe did not present any evidence involving similarly situated employees or pretext on the part of the employer, the court reasoned that she would need to show either direct evidence of discrimination or examples of circumstantial evidence that added up to discrimination in order to prove her case.[51]

Troupe offered two pieces of circumstantial evidence in her favor.[52] First, Lord & Taylor fired her the day before her maternity leave began although, once she returned, the reason for her tardiness would have been resolved.[53] Second, her supervisor had told her that she was being fired because no one expected her to return from maternity leave.[54] Troupe offered these two facts as proof that the reason behind her dismissal was that she might not return after having her baby.[55]

The court explained that, because Troupe alleged that the defendant was motivated by a fear that she would not return to work, the main issue on appeal was whether termination of a pregnant employee to avoid paying the costs of maternity leave is prohibited by the PDA.[56] The court reasoned that although Title VII requires a finding that the

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[45] *See id.* at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.

[46] *Id.* at 736, 64 Fair Empl. Prac. Cas. (BNA) at 513–14.

[47] *Id.* According to the court, the ambiguous statements may be oral or written and may even be directed at other employees in the protected group. *Id.*, 64 Fair Empl. Prac. Cas. (BNA) at 514. The court noted that this type of evidence is the one most commonly found in cases of intentional discrimination because "employers have taught their supervisory employees not to put discriminatory beliefs or attitudes into words oral or written." *Id.*

[48] *Troupe*, 20 F.3d at 736, 64 Fair Empl. Prac. Cas. (BNA) at 514. The court noted that this type of evidence may be either statistical or anecdotal. *See id.*

[49] *Id.*

[50] *Id.*

[51] *See id.* at 736–37, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[52] *Id.* at 737, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[53] *Troupe*, 20 F.3d at 737, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[54] *Id.*, 64 Fair Empl. Prac. Cas. (BNA) at 515.

[55] *Id.*

[56] *Id.*

employer dismissed the plaintiff based on her membership in a protected class, it does not protect against a financially motivated dismissal.[57] The court reasoned that dismissing a pregnant employee because she may not return to work is not discriminatory unless non-pregnant employees are retained under similar circumstances.[58] Although Troupe may have a case for breach of contract, the court concluded that she could not show that Lord & Taylor discriminated against her on the basis of pregnancy.[59]

The court rejected the argument made by some feminists that employers should make accommodations for pregnant women to put them on an equal footing with their co-workers.[60] One scholar has suggested that because women who reproduce are placed at a disadvantage when compared with men who reproduce, employers must give women the opportunity to compete as equals.[61] The court disagreed with this stance and stated that the appropriate comparison group for pregnant employees should be non-pregnant employees with medical disabilities.[62] The court concluded that employers need not make any special accommodations for pregnant employees unless non-pregnant employees receive similar accommodations.[63] The court also noted that an employer may legitimately confirm an employee's intention to return to work before supplying any disability leave benefits.[64]

Consequently, the court noted that the outcome of the case may have been different if Troupe had shown that the defendant had given better treatment to a non-pregnant employee beginning a disability leave.[65] Troupe conceded that she was continually tardy throughout

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[57] *See id.* at 738, 64 Fair Empl. Prac. Cas. (BNA) at 515. The court gave the example of a "hypothetical Mr. Troupe" who was dismissed while he was preparing to take an extended leave. *Id.* "If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it." *Id.*

[58] *Troupe*, 20 F.3d at 738, 64 Fair Empl. Prac. Cas. (BNA) at 515.

[59] *Id.*

[60] *Id.*; Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1, 27 (1985).

[61] Kay, *supra* note 60, at 26. Kay asserts that it would be "unjust to place the consequential disadvantages of reproductive conduct only upon women." *Id.* Kay suggests that by making accommodations for a woman in areas where performance is affected by pregnancy, her "equality of opportunity" will be preserved until the end of the pregnancy. *See id.* at 26–29.

[62] *See Troupe*, 20 F.3d at 738, 64 Fair Empl. Prac. Cas. (BNA) at 515. The court's comparison group would include both men and women who suffered from temporary disabilities. *See id.*

[63] *See id.*, 64 Fair Empl. Prac. Cas. (BNA) at 515.

[64] *Id.* The court made this statement in reference to Title VII only, and not to employees with employment contracts. *See id.* at 737, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[65] *See id.* at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.

her pregnancy.[66] According to the court, Title VII did not require the employer to retain Troupe if she could not perform her duties because of her pregnancy.[67] With no evidence that the defendant had acted more leniently toward other tardy employees, the court concluded that the plaintiff could not prove that her employer had violated Title VII.[68] The court held that the PDA does not mandate better treatment for pregnant employees than for other employees with medical problems unrelated to pregnancy.[69]

Judge Posner limited the PDA with his opinion in *Troupe* to a point where he may have controverted the congressional goals behind the passage of the Act. By holding that a financially motivated dismissal does not violate Title VII unless it is directed solely at pregnant employees, the Seventh Circuit is allowing a subtle form of sex discrimination to flourish.[70] If an employer decides that it makes good business sense to terminate all employees who plan to take paid leaves because they may not return to their positions, then the employees will probably want to avoid situations in which they risk termination. Thus, the employer can pressure women into avoiding pregnancy for fear of losing their jobs. In contrast, because employees have no control over illnesses and accidents, an employer's anti-leave policy will not affect whether they become disabled by a condition other than pregnancy.[71] By putting constraints on a woman's choice to become pregnant, the employer violates the policy goals of the PDA.[72]

In addition, the court is essentially forcing a plaintiff like Troupe, who believes that her dismissal was prompted by economic concerns, to present comparison evidence in order to prove discrimination.[73] The court distinguishes the present case from *Ackerman*, where the plaintiff demonstrated pregnancy discrimination by presenting clear examples of disparate treatment in comparison to non-pregnant employees.[74] The court noted that this emphasis on comparative evidence

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[66] *Id.* at 737, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[67] *Troupe*, 20 F.3d at 737, 64 Fair Empl. Prac. Cas. (BNA) at 514.

[68] *See id.* at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.

[69] *See id.*

[70] *See id.*

[71] *See* Kay, *supra* note 60, at 36.

[72] *See* Wald, *supra* note 3, at 591, 599–600.

[73] *See Troupe*, 20 F.3d at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.

[74] *See id.* at 738, 64 Fair Empl. Prac. Cas. (BNA) at 516; EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944, 949, 58 Fair Empl. Prac. Cas. (BNA) 114, 118 (10th Cir. 1992) (employer did not allow secretary to reduce her overtime even though similar exceptions had been made for employees with other medical conditions).

could make it difficult for a plaintiff in the absence of comparisons, but decided to reserve that issue until it arose in the context of a case.[75]

Troupe's attorney may have lost the case by arguing that the suspicious timing of her dismissal and the ambiguous statement made by her supervisor pointed to a financially motivated dismissal rather than pregnancy discrimination.[76] When the court examined the evidence, it explained that it would not discuss whether Lord & Taylor reacted directly to the pregnancy or morning sickness by dismissing Troupe because that interpretation was never presented by Troupe's lawyer.[77] Thus, Troupe's evidence may have been an example of the first type of circumstantial evidence described by the court, and it may have been sufficient to create an issue for trial. Instead of discussing the evidence in that light, the court concluded that "her failure to present any comparison evidence doomed her case."[78]

Troupe may not have explicitly argued that she was dismissed on the basis of her pregnancy because she equated it with a dismissal to save disability benefits. The notion that it is economically unsound to pay maternity leave benefits to a pregnant employee is discriminatory because it assumes that women with children will not be committed to their jobs.[79] The court's decision allows an employer to terminate pregnant women because they will cost more money as long as the employer would react similarly in the case of a non-pregnant worker. It is difficult, however, to separate this seemingly egalitarian reasoning from the fact that women will recognize that if they do not get pregnant, they will be able to keep their jobs. If employers are allowed to continue such practices, then women will continue to be penalized for exercising their right to have children.

In summary, the United States Court of Appeals for the Seventh Circuit held that the PDA permits an employer to dismiss a pregnant employee who is late for work even if the dismissal is motivated by the employer's desire to save money.[80] The court recognized that a plaintiff

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[75] *Troupe*, 20 F.3d at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 516. Because Troupe never claimed that it was impossible for her to find a comparison group, this issue did not pertain to the present case. *Id.* at 738, 64 Fair Empl. Prac. Cas. (BNA) at 516.

[76] *See id.* at 737, 64 Fair Empl. Prac. Cas. (BNA) at 515.

[77] *See id.*, 64 Fair Empl. Prac. Cas. (BNA) at 514–15. Since Troupe's lawyer never made this argument, the court refused to consider it. *Id.*, 64 Fair Empl. Prac. Cas. (BNA) at 515.

[78] *Id.* at 739, 64 Fair Empl. Prac. Cas. (BNA) at 516.

[79] *See* Reva B. Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 956 (1985) ("Where tradition has presumed the incompatibility of pregnancy and employment, the PDA now substitutes a countervailing presumption of compatibility.").

[80] *See Troupe*, 20 F.3d at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.

may present either direct or circumstantial evidence as proof of discrimination under the PDA.[81] The court stated, however, that a financially motivated dismissal can only be considered discriminatory when an employee can show that employees with medical conditions other than pregnancy have been treated differently.[82] This result does not conform to the intent of the PDA because it will force women to choose between keeping their jobs and having children.

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[81] *Id.* at 736, 64 Fair Empl. Prac. Cas. (BNA) at 513–14.

[82] *See id.* at 738–39, 64 Fair Empl. Prac. Cas. (BNA) at 515–16.